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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA

REPORT OF THE PREPARATORY COMMISSION UNDER PARAGRAPH 10 OF RESOLUTION I CONTAINING RECOMMENDATIONS FOR SUBMISSION TO THE MEETING OF STATES PARTIES TO BE CONVENED IN ACCORDANCE WITH ANNEX VI, ARTICLE 4, OF THE CONVENTION REGARDING PRACTICAL ARRANGEMENTS FOR THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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* To replace article 32, paras. 1 and 2.

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Geneva, 13 August-5 September 1984

CHAIRMAN'S SUMMING UP OF THE DISCUSSIONS

I. COMPOSITION OF THE TRIBUNAL AND ITS CHAMBERS

In summing up the exchange of views on the question of composition of the Tribunal, the Chairman made reference to LOS/PCN/SCN.4/1984/CRP.3.

The Tribunal

Starting from the requirement that in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured and taking into account that article 3 (2) of the Statute prescribes a minimum of three members from each geographical group as established by the General Assembly of the United Nations, different suggestions had been put forward during the discussion as to how the additional six members to make up a body of twenty-one members should be determined.

While some speakers proposed that each of the five geographical groups be given one additional seat and that the one left over be allotted pursuant to the rotation principle, other speakers pointed out that this would merely amount to equal geographical distribution, no account being taken of the principle of equitable geographical distribution that is specified in the Statute.

Several delegations underlined that above all what would have to be assured in determining the composition of a legal body like the Tribunal was that all the principal legal systems of the world would be represented. But, in this connection reference was also made to the need for defining what was to be understood by "principal legal systems". Some were of the opinion that the principal legal systems could already have been represented through the five regional groups.

Sea-Bed Disputes Chamber

As regards the composition of the Sea-Bed Disputes Chamber, it was proposed, among other things, that each of the five geographical groups of the United Nations system be represented by two members each, and that the remaining eleventh seat

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should rotate among these geographical groups. Other speakers felt that if such a selection was made, no account would be taken of the principle of equitable geographical distribution.

Several speakers emphasized that in determining the composition of both the Tribunal and its chambers, account should be taken of the different areas of expertise in Law of the Sea matters.

Chambers for particular categories of disputes

With regard to the standing chambers composed of three or more members to deal with particular categories of disputes, which are provided for in article 15 (1) of the Statute, some delegates pointed out that in determining the composition of these chambers, it was neither possible nor necessary to apply the principle of equitable geographical distribution because for these chambers, the expertise of the judges should be the prevalent consideration. Others proposed, among other things, to fix the number of members of these chambers at five, so as to ensure that all five geographical groups would be equally represented.

Chamber for Summary Procedure

With regard to the composition of the Chamber for Summary Procedures, also different proposals were submitted. While some speakers felt that equal geographical distribution would have to be assured in that chamber, with a rotation system applying to alternates, others held the view that it should be left to the discretion of the members of the Tribunal to decide upon the composition of this and other chambers.

General considerations

Several delegates cautioned that at least at the present stage of the discussion, no overly firm and detailed rules should be established for the composition of the Tribunal and its chambers since the time was not ripe for doing so. Others had doubts as to whether the procedural rules for the Tribunal was the right place in which to specify the principles for the composition of the Tribunal laid down in articles 2 and 3 of the Statute. The speakers felt that the decisions to be taken by the Meeting of States Parties to the Convention on the composition of the Tribunal should not be prejudged. On the other hand, the view was expressed that it could be useful indeed if the Meeting of States Parties, when called upon to decide on the composition of the Tribunal, could draw on relevant proposals and recommendations of the Preparatory Commission.

On balance, the preliminary exchange of views on the questions of representation and distribution had helped to identify the issues to be resolved in drawing up relevant rules for the Tribunal. At the same time it was noted that possibly not all of the problems related to representation and distribution need to be provided for conclusively and in detail in the draft procedural rules of the Tribunal that are to be elaborated.

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One delegation requested the Secretariat to prepare a comparative table on the views expressed regarding the distribution of the six additional members of the Tribunal. Many delegations who spoke only expressed preliminary views and several expressed a willingness to consider alternative approaches. Some suggested that it should be left to the Meeting of States Parties to decide. Taking these factors into account, the Chairman raised the question as to whether the Secretariat could be expected to draw up a comparative table which would be definitive. He therefore suggested that consideration of that request could be taken up at a later stage, once the consideration of all the issues was over.

Officials and precedence; nominations, elections and selections

Since the views expressed on these matters consisted of specific responses to the issues identified in paragraphs 9 and 10 of LOS/PCN/SCN.4/CRP.3, the Chairman indicated that he would not try to sum up the discussion but that the views could be taken into account in preparing the rules of procedure.

He did, however, make special mention of three issues in respect of which there were trends. These were:

(i) That as regards officials, only those identified in the Statute of the Tribunal should be provided for; and, that it was not appropriate to go beyond the requirements of the Statute which is for a President and Vice-President of the Tribunal and a President of the Sea-Bed Disputes Chamber;

(ii) That the rules of the International Court of Justice should be followed as regards precedence and seniority; and,

(iii) That the procedure for "selection" of the members of the Sea-Bed Disputes Chamber should be on the basis for instance, of a slate or list; taking into account a system of rotation and expertise in the membership; and following as far as possible - some consensus procedure. A majority decision would be taken only if this fails and then too only in respect of matters that do not attract consensus. There could be a "package deal" procedure that should reflect consensus, and failing that only, reflecting the majority views.

II. ACCESS OF ENTITIES OTHER THAN STATES

The preliminary exchange of views on the question of access by entities other than States followed the identification of some relevant issues by the Chairman in LOS/PCN/SCN.4/1984/CRP.4.

Intergovernmental organization provided for in annex IX

As regards access by intergovernmental organizations, different responses were given to the questions raised in paragraph 6, since on these problems the previous practice in the peaceful settlement of disputes offers but few precedents that would provide clear guidelines for the solution of these issues.

Some delegations held the view that when a dispute is submitted to the Tribunal and one or more intergovernmental organizations are parties, there was no justification for the Tribunal to examine proprio motu whether such intergovernmental organization or organizations have had competence transferred to them by the member States in respect of the specific matter at issue between the parties to that dispute. They argued that this question had been fully settled through the relevant provisions of the Convention and annex IX.

Other delegations held the view that when a dispute is submitted to the Tribunal and one or more intergovernmental organizations are parties, the Tribunal should examine proprio motu whether such intergovernmental organization or organizations have competence in respect of the specific matter at issue between the parties to that dispute, because access by such organizations to the Tribunal and its chambers was confined to such matters over which competence had explicitly been transferred to them by their member States.

Other speakers felt that the Tribunal should examine this question only in those cases where the other party to the dispute challenges such competence of the intergovernmental organization. If the competence of the intergovernmental organization is not challenged, the Tribunal should only verify the documents submitted under article 5 of annex IX.

As regards the manner of application of article 17 of the Statute of the Tribunal, which refers to members of the nationality of the parties to a dispute, some delegations were of the view that no specific rules were necessary because intergovernmental organizations should be subject to the same rules as States. They felt that such organizations should also have the right to nominate ad hoc judges. The question of nationality would not arise since intergovernmental organizations did not possess a nationality.

Other delegations contradicted this view by pointing out that in order to ensure the fairness and impartiality of the Bench, one could not ignore a situation in which one or more members of the Tribunal could be nationals of member States of an intergovernmental organization party to a dispute.

With regard to the questions raised in paragraph 6 (c) of CRP.4, various solutions were proposed. One possible approach was that only one of the members of the Tribunal possessing the nationality of one of the member States of the intergovernmental organization concerned should have the right to sit in the particular case. Another option proposed was to allow the other party to the dispute to nominate an equal number of ad hoc judges of its choice. Some delegates pointed out that for the purposes of article 17 of the Statute of the Tribunal, member States of an intergovernmental organization party to a dispute should be regarded as parties in the same interest. The view was expressed that specific rules for the case mentioned in paragraph 6 (c) of CRP.4 were superfluous since intergovernmental organizations did not possess a nationality.

The discussion revealed support for what is stated in paragraph 7 of CRP.4, namely, that where the participation of intergovernmental organizations in proceedings of the Tribunal and its chambers is concerned, the rules of procedure of the Tribunal should provide such solutions as would ensure on the one hand, fair and equal treatment of all parties to a given dispute, and on the other hand, the highest possible standard of efficiency and effectiveness in the proceedings.

The Authority, the Enterprise and natural or juridical persons

The issue raised in paragraph 9 of CRP.4 as to what documentation would be required to be furnished by natural and juridical persons along with their application when submitting a dispute to the Sea-Bed Disputes Chamber was answered by some delegates to the effect that the rules of the Tribunal should contain provisions similar to those of the Court of Justice of the European Communities. Moreover, it was considered that such documentation could even go beyond what is required under the relevant rules of the aforementioned Court.

Characteristics of nationality

Concerning the question of the characteristics of nationality of the entities listed in subparagraphs (a) and (b) of paragraph 10, CRP.4, a number of delegations drew attention to the fact that the problems relating to access by entities other than States were so complex that further detailed study was required, which is why a cautious approach to this matter appeared advisable. This was called for in particular with regard to access by international consortia to the Sea-Bed Disputes Chamber. As regards the Authority and its Enterprise, the view was expressed that neither of these entities had a nationality and that therefore the problems connected with article 17 of the Statute would not arise. Others pointed to the commercial character of the Enterprise in support of their argument that that entity could nominate ad hoc judges.

Prompt release of vessels

In the course of the debate on CRP.4, it was also pointed out that specific procedural rules were required to govern access to the Tribunal in connection with the prompt release of vessels and crews pursuant to article 292 of the Convention and the form under which the authorization of the Flag States to act on behalf on it should be given.

Other intergovernmental organizations

As regards the point raised in paragraph 11 of CRP.4 as to whether or not the Tribunal should have competence to request relevant information from competent international organizations, affirmative answers were given. In this connection, it was felt that it could be useful to follow the relevant provisions of article 34 of the Statute of the International Court of Justice.

It was also noted that there was a need to co-ordinate the work on this question with Special Commission 3.

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III. ADVISORY OPINIONS

Due to the limitation of time, the question of the advisory jurisdiction of the Sea-Bed Disputes Chamber was only discussed briefly.

In discussing this question, account was taken of the need for the final examination of that issue to be dealt concurrently with the consideration of this question by the Preparatory Commission in Plenary, because corresponding provisions would have to be made in the rules, regulations and procedures of the Authority.

The preliminary exchange of views revealed agreement to the effect that the provisions of Chapter IV of the Statute of the International Court of Justice as well as part IV of the Rules of the Court concerning advisory proceedings offer a good basis for the elaboration of pertinent rules of procedure for the Sea-Bed Disputes Chamber in the exercise of its functions relating to advisory opinions.

The discussion on the three issues raised in document LOS/PCN/SCN.4/1984/CRP.5 was brief and was confined to preliminary reactions.

The first question as to whether or not the Assembly or the Council could request an advisory opinion on matters which are already under consideration in a contentious case between the Authority and another party was unanimously answered in the negative by the delegates who took the floor. It was pointed out that this view followed the principle of equal treatment of all parties before a court.

With respect to the second question, it was generally felt that the rules of procedure should further elaborate on the provision of article 191 of the Convention under which an advisory opinion shall be given as a matter of urgency. Several delegates proposed that in drawing up the relevant rules in this context, guidance should be sought from rule 103 of the rules of procedure of the International Court of Justice.

The third question as to whether the proceedings to be instituted before the Sea-Bed Disputes Chamber under article 185 of the Convention, by the Council of the Authority for gross and persistent violations of part XI should be submitted as contentious cases or as advisory opinions, and was answered by nearly all delegates taking the floor to the effect that these proceedings were contentious in nature. This response, it was argued, followed from the very content of article 185. Only if this was assured would a State party to the Convention which was alleged to have violated part XI be in a position to exercise its right of defence.

One delegate was of the opinion that a recommendation of the Council and an opinion of the Sea-Bed Disputes Chamber should be required before the Assembly could decide to suspend the exercise of the rights and privileges of a State party that had grossly and persistently violated part XI. After a decision by the Assembly, the other party should be free to have recourse to court.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
SPECIAL COMMISSION 4
Geneva, 13 August - 5 September 1984

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON PARTS I AND II OF THE DRAFT RULES OF THE TRIBUNAL

1. After the Secretary introduced the Draft Rules as contained in the Working Paper (LOS/PCN/SCN.4/WP.2), the Special Commission decided, in accordance with the recommendations of its bureau, that it should proceed with a first reading of the draft in an article by article examination of the Draft Rules and that subject to the discussions and suggestions made, the articles reviewed would be considered approved ad-referendum unless their further examination was deferred. In carrying out its examination of the text, the Special Commission followed the suggestion of the Chairman, based on the recommendations of the bureau that:

(i) since many of the draft rules closely followed the Rules of the International Court of Justice in cases where their respective Statutes were parallel, in such cases only changes necessary to align the text in the different languages should be examined;

(ii) drafting suggestions which did not touch on substance should be submitted to the chair for consideration in revising the text; and,

(iii) discussions should be limited to substantive matters which arose because the special provisions in the Convention or in the Statute of the Tribunal were different from the Statute of the International Court of Justice

PREAMBLE

2. In discussing the Preamble, differing views were expressed as to the need to identify specific parts of the Convention in the first preambular paragraph. It appeared that a reference to the most important parts namely, Parts XI and XV, should be maintained. After a preliminary exchange of views, it was decided to revert to the preamble after completing the consideration of the draft rules when a clearer idea of the matters and the provisions of the Convention involved were seen.

PART I

Title to Section A and Article 1

3. In discussing the title to Section A of Part I and Article 1 itself, it was the broadly held view that it is inappropriate to use the term "judge" since the Statute of the Tribunal only refers to "members". It was concluded

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that throughout the text the references should be adjusted accordingly. Consequential changes would have to be made throughout the Draft Rules to distinguish between "elected" members and members appointed ad hoc for a particular case in accordance with Article 17 of the Statute of the Tribunal.

4. In dealing with Article 1, a suggestion was made that a separate article should be put in reflecting the content of Article 12, paragraph 4, of the International Court of Justice Statute. It should provide that if there is an equality of votes among the judges, the eldest judge would have a casting vote.

Article 2

5. There was also a suggestion that Article 2, paragraph 2, should be modified to provide that the term of office of an elected member who replaces another whose term has not expired, should begin to run from the date on which he assumes his functions at the seat of the Tribunal and not from the date of election. However, a different view was expressed by those who suggested that the provision of the International Court of Justice Rules should be maintained in this regard.

Articles 3 - 6

6. In discussing Articles 3, 4, 5 and 6, comments were made inter alia on :

(i) the need for the reference to "senior judge of the Tribunal" in Article 3, paragraph 6, and whether the words "of the Tribunal" could be deleted;

(ii) the need to reflect the substance of relevant cross references of the Statute in Article 5, paragraph 1; and,

(iii) the need for the phrase at the end of Article 6 which provides that if a request is made, a vote should be taken.

However, no conclusive trend or direction could be identified in regard to these suggestions.

Article 7

7. In relation to Article 7, discussion was confined to its second paragraph. The issue raised was:

> whether the term "sit" was appropriate and whether broader reference should be made to cover participation in the deliberations but not in the decision.

Again, there was no clear trend.

Article 8

8. Later, the same problem that surfaced in the discussion concerning Article 7, paragraph 2 surfaced again in dealing with Article 8, paragraph 3. There appears to be support for the suggestion that the reference in line 1 to "any case" should be replaced by "each case".

Article 9

9. Article 9 stimulated much discussion specially since that article had a different origin and used different terminology to the corresponding provisions of the International Court's Rules and Statute. The primary question seemed to center around the use of the term "expert" in the Convention rather than the word "assessor" as is used in the Court's Rules. After analyzing (a) the history of that provision, (b) the similarity of the function, and (c) the relevant commentary on that article, there seems to be agreement that the provisions of Article 9 would necessarily have to be different to the corresponding provisions of the International Court's Rules. With reference to paragraph 1 of that article, a suggestion was made which seemed to have support. It was to the effect that the stage at which experts could be requested and appointed should be extended beyond the point of closure of the Written Proceedings. This should be done only at the request of a party. If such a request was made and the appointment of an expert was made at a later stage, then the other party should be given adequate time to deal with it..

10. In discussing paragraph 1, the question was raised whether experts should participate in advisory proceedings also. It was pointed out that such proceedings would involve scientific or technical matters in the consideration of which the advice of experts might be useful. In one view, the Statute permitted it.

11. Other delegations, however, stressed that Article 289 of the Convention referred to disputes and that experts could therefore be appointed only in contentious cases. This interpretation, it was felt, followed also from the provision of Article 289 under which experts shall be selected in consultation with the parties. One could not speak of parties in advisory proceedings. There was nothing in the Convention that envisaged the participation of experts in advisory proceedings. The Law of the Sea Convention should be interpreted strictly and not liberally. In accordance with Article 191 of the Convention, it was only for the Sea-Bed Disputes Chamber to give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities.

12. Some delegations suggested that the question as to whether experts could participate in advisory proceedings be taken up again in connection with Part IV dealing with the Sea-Bed Disputes Chamber.

13. With regard to Article 9, paragraph 1, it was proposed that the text should reflect more clearly that a request for the participation of experts may be made by one of the parties.

14. Concerning paragraph 2, it was pointed out that it went beyond Article 289 of the Convention in the sense that the President should consult the relevant list prepared in accordance with Annex VIII, Article 2 of the Convention, and that the choice should only be made from that list. To this end, a number of formulations were proposed to make it clear that the experts should, not necessarily but preferably, and only with regard to matters mentioned in Article 1 of Annex VIII, be selected from the aforementioned lists. Formulations to this effect were presented with respect to paragraph 2 and paragraph 3 of Article 9.

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15. With regard to paragraph 3, one delegation suggested the deletion of the latter part which states that the experts should be chosen "by secret ballot and by a majority of the votes of the judges composing the Tribunal for the case". It was argued that the second part was in contradiction with the provision of the first part of paragraph 3, under which the experts shall be selected in consultation with the parties to the dispute.

Section B. The Presidency - Articles 10-14

16. Concerning Section B, dealing with the Presidency of the Tribunal, no reformulations were suggested. It is to be noted in this context that Articles 10-14, making up that section, follow the language of Articles 10-14 of the Rules of the International Court of Justice because the Statute of the Tribunal contains the same provisions as the Statute of the International Court of Justice.

Section C. The Sea-Bed Disputes Chamber - Article 15

17. Section C consists only of Article 15, which has a reference to Part IV of the Draft Rules governing the composition, the presidency and the proceedings before the Sea-Bed Disputes Chamber. Following the proposal of the Chairman, the substantive discussion of Section C was deferred until the consideration of Parts IV and V of the Draft Rules. However, one suggestion of a drafting nature was made. There was also a proposal to merge Sections C and D into a single general section entitled "Special Chambers".

Section D. Special Chambers

18. As regards Section D, dealing with special chambers, the following suggestions were made:

Article 16

19. Several delegations suggested that in the composition of the special chambers, the representation of the principal legal systems of the world and equitable geographical distribution should be assured. In that view, Article 16 of the Draft Rules should contain a reference to Article 2, paragraph 2, of the Statute of the Tribunal. Another suggestion was that the first sentence of Article 16 should be amended to provide that the five Members of the Tribunal composing the Chamber of Summary Procedure should be selected from the five geographical regions. A reformulation to the same effect was made concerning Article 18, paragraph 3.

20. Other delegations contested this view by pointing out that pursuant to the Statute of the Tribunal, the representation of the principal legal systems of the world and equitable geographical distribution were to be assured only with regard to the composition of the "Tribunal as a whole and of its Sea-Bed Disputes Chamber". It was noted that States should have confidence in the Tribunal which had to determine the composition of the special chambers.

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21. It was also noted that application of the principles laid down in Article 2 of the Statue with regard to the special chambers could lead to insoluble problems in complying with the provisions on the nationality of the members of these special chambers as contained in Article 17, paragraph 4, of the Statute.

Article 17

22. Some of the delegations were of the view that the principles set forth in Article 2 of the Statute of the Tribunal should apply to the composition of the Chamber of Summary Procedure. However, these principles could not be applicable in regard to the other standing special chambers referred to in Article 17 of the Draft Rules because those chambers could be formed of less than five members of the Tribunal, and under such circumstances, there could not be equitable representation of the five geographical groups.

Articles 18-19

23. As for the *ad hoc* special chambers envisaged in Article 18 of the Draft Rules, the principles set forth in Article 2 of the Statute of the Tribunal could not apply as the composition of such chambers shall be determined by the Tribunal with the approval of the parties to the dispute. It was left to them to decide on the composition of these *ad hoc* chambers and whether they should be governed by criteria other than those set out in Article 2 of the Statute.

24. In the light of the different views expressed in the discussion on the composition of the special chambers, the proposal was finally made to adopt a flexible approach taking into account the requirements of Article 15 of the Statute, and to insert in Article 19 a provision that at the time of election of the Members, due regard should be given to Article 2, paragraph 2, of the Statute. That article sets forth representation of the principal legal systems and the principle of equitable geographical distribution.. Such a provision would guide the Members of the Tribunal in determining the composition of the special chambers.

25. In addition, other suggestions were submitted by delegations concerning the draft articles contained in Section D. They are:

- The reference in Article 18, paragraph 2, of the Draft Rules to Article 17, paragraph 4, of the Statute of the Tribunal should also be inserted in draft Articles 16 and 17;

The first sentence of Article 18, paragraph 3, should be amended to read that "the Tribunal shall *appoint*, with the approval of the parties, the members who are to constitute the chamber".

Concerning Article 19, paragraph 1, second sentence, there was a proposal designed to bring the English text in line with the French text.

- A reformulation of the same paragraph, second sentence, was submitted by one delegation. It would read that "... the Member of the Tribunal obtaining the largest number of votes and the votes of the majority of the Members of the Tribunal present and voting ... shall be declared elected." This was opposed by other delegations who expressed the view that this would be an unnecessary departure from the respective Rules of the International Court of Justice.

26. One delegation pointed out that the election procedure for the special chambers, as laid down in Article 19, could not apply to the formation of the ad hoc chambers. The composition of such chambers were determined with the consent of the parties and there was no requirement for election. It was therefore suggested to redraft the first sentence of Article 19 to the effect that "election to chambers shall take place by secret ballot". This suggestion was opposed by one delegation which wanted the existing text maintained.

Section E. Internal Functioning of the Tribunal

27. With regard to the draft article of Section E embodying the Rules on the internal functioning of the Tribunal, the following suggestions were made:

Article 20

28. When discussing Article 20 which envisages that the internal judicial practice of the Tribunal shall, subject to the provisions of the Statute and these Rules, be governed by any resolutions on the subject adopted by the Tribunal, one delegation raised the question whether the Rules on the internal functioning of the Tribunal should be put in the Rules of the Tribunal or in a separate document.

29. Another delegation suggested modifying Article 20 to provide that the internal judicial practice of the Tribunal should, subject to the United Nations Convention on the Law of the Sea, the Statute of the Tribunal annexed thereto, and the Rules, be governed by any resolutions on the subject adopted by the Tribunal.

Article 21

30. Concerning Article 21, paragraph 2, suggestions were made to the effect that Members of the Tribunal should hold themselves permanently available to exercise their functions as Members of the Tribunal and should be required to attend all meetings of the Tribunal unless they are prevented from attending for the reasons mentioned in that paragraph. In making this proposal, it was pointed out that such a formulation would be more in line with Article 18, paragraph 1, of the Tribunal's Statute which provided for members to receive an annual allowance and a special allowance for each day on which a member exercises his functions. This was different from the provisions in the International Court of Justice Statute which provided for the Court to be in permanent session.

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Article 22

31. In connection with Article 22, the question of the participation of experts in the judicial deliberations of the Tribunal, raised already in the consideration of Article 9, came up again for discussion. There was a large measure of agreement that there is a fundamental difference between the Members of the Tribunal and experts. An expert cannot assume the functions of a judge. Experts are only needed when the Tribunal constitutes itself into a scientific or technical body.

32. Some delegations had difficulties with the working of Article 22, paragraph 2, which appeared to give an automatic right to the experts to participate in the judicial deliberations of the Tribunal. Therefore, it was suggested to amend Article 22, paragraph 2, to the effect that experts participate in the judicial deliberations only if the Tribunal deems necessary. It was clear that experts may not participate in the judicial decisions of the Members of the Tribunal.

PART II

Article 23

33. That draft article deals with the election of the Registrar. To make the election of the chief administrative officer of the Tribunal more democratic, one delegation suggested that candidates for the post of Registrar should not only be proposed by the Members of the Tribunal but prospective candidates should themselves be allowed to apply for the post. As a logical consequence, it was suggested that notice of vacancies should be given "through appropriate means" rather than only to the "Members of the Tribunal" as provided in paragraph 2.

34. Another suggestion was that only nationals of States Parties to the Law of the Sea Convention, or States that have accepted the jurisdiction of the Tribunal shall be considered. However, other delegations opposed these changes of paragraphs 1 and 2 on the grounds that the wording of these paragraphs followed the language of Article 22 of the Rules of the International Court of Justice and that these Rules had proved their worth in practice.

35. Another suggestion was that representation of the principal legal systems of the world and equitable geographical distribution, laid down in Article 2, paragraph 2, of the Statute of the Tribunal, shall be assured not only in the election of the Members of the Tribunal but also in the election of the Registrar and the Deputy-Registrar.

36. Another opinion was that the provisions of Article 12, paragraph 2, of the Tribunal Statute, according to which the Tribunal shall appoint its Registrar, should be interpreted to mean that a selection, rather than an election, was to take place. The wording of paragraph 1 of draft article 23, under which the Registrar was to be elected by secret ballot, was therefore not acceptable.

37. Paragraph 3 of Article 23 should not enumerate the information required with regard to a candidate but be reworded to refer to "relevant information", in one view. Others disagreed with this pointing out that it was appropriate to mention the required qualifications.

38. Another view was that the qualifications concerning candidates should be more precise to the effect that previous experience in law, particularly the Law of the Sea, diplomacy or the work of international organizations should be required.

39. Concerning paragraph 4, one delegation suggested that the reference to "Members of the Tribunal composing it at the time of the election" should be replaced by the formulation "Members of the Tribunal present and voting at the time of the election ..."

40. There was a suggestion for an additional paragraph in Article 23 to stipulate, in accordance with Article 12, paragraph 3, of the Tribunal Statute, that the Registrar should reside at the seat of the Tribunal. Other delegations rejected this proposal by arguing that those articles from the Statute of the Tribunal which require no further elaboration should not be repeated in the Rules of the Tribunal.

Article 24

41. Some delegations did not think it was justified and necessary to create, besides the Registrar and Deputy-Registrar, an additional third post of Assistant-Registrar who would function as Registrar of the Sea-Bed Disputes Chamber. They were of the view that the Registrar could assign duties to other officers, including the function of Registrar of the Sea-Bed Disputes Chamber. This would give the Registrar the necessary leeway. They preferred to have a Registrar and Deputy-Registrar complemented by the staff. Consequential changes, it was felt, would have to be made in draft Articles 25 and 26.

42. Other delegations supported the idea underlying draft Article 24 that the Sea-Bed Disputes Chamber, which functions as a court within a court, should have its own Registrar, who should function with some amount of autonomy. In this connection, it was proposed that to reflect more clearly the relative independence and importance of the functions of the Registrar of the Sea-Bed Disputes Chamber, the Assistant-Registrar, envisaged for the Sea-Bed Disputes Chamber, should be a Deputy-Registrar.

43. Other questions raised were whether it would not be appropriate for the Deputy Registrar to function as Registrar of the Sea-Bed Disputes Chamber; whether the arrangement proposed for this trinity of officials would permit the appropriate chain of command; and whether the matter should be left to the Tribunal to decide, depending on need.

44. To assure the necessary flexibility in the appointment of the officers of the registry, the suggestion was made that the Tribunal should appoint an Assistant-Registrar for that purpose, if and when necessary.

45. Some delegations suggested that the proposals made on paragraphs 1 and 2 of draft Article 23 with a view to ensuring the selection of the Registrar on the basis of more democratic principles, should apply also to the appointment of the Deputy-Registrar and Assistant-Registrar.

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Article 25

46. There was one comment that paragraphs 1 and 2 of the article be unified and, at the same time, be made more precise. In that view, the text of the solemn declaration would not be affected by the proposal.

47. In line with the suggestion made when discussing Article 24, that the creation of the post of Assistant-Registrar would not seem to be justified, those delegations suggested that the reference to an Assistant-Registrar in paragraph 2 should be put in square brackets. Other delegations were against this proposal for the reasons given earlier in connection with draft Article 24, namely, that there was a need to have an Assistant-Registrar or Deputy-Registrar acting as Registrar of the Sea-Bed Disputes Chamber, as an independent person.

Article 26

48. With respect to draft Article 26, the only comment was to the effect that the appointments of staff members of the Registry should be based not only on the proposals submitted by the Registrar but also on proposals submitted by States Parties to the Convention.

Article 27

49. Concerning draft Article 27, which enumerates the functions of the Registrar, the following suggestions were made on paragraph 1 (comments on subparagraph (c), which was considered in the context of Article 31 are also included here):

subparagraph (c): There should be no reference to Article 31, paragraph 1, of these Rules, since the declarations dealt with in that paragraph are to be deposited by the States Parties to the Convention with the Secretary-General of the United Nations and not with the Registrar.

With reference to declarations under Article 287 of the Convention, another delegation suggested that only copies of the declarations should be transmitted to the Tribunal by the Secretary-General and should be kept in the custody of declarations made in accordance with Article 288 of the Convention and paragraphs 3 and 4 of Rule 31.

subparagraph (e): in the first line the word "country" should be replaced by "State";

subparagraph (f): concerning the Assistant-Registrar mentioned in that subparagraph, attention was drawn to the discussion held on draft Article 24;

One delegation suggested the deletion of that subparagraph in the event that Article 24 were to be adopted in its present wording. Should the post of Assistant-Registrar be created, who would be entrusted

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with the function of Registrar of the Sea-Bed Disputes Chamber, the Registrar could not assign the Assistant-Registrar to be present at the meetings of the Chamber, and much less so the Deputy-Registrar. Hence, if under Article 24 the Assistant-Registrar would already be charged with the function of Registrar of the Sea-Bed Disputes Chamber, it would no longer be up to the Registrar to delegate this function.

subparagraph (h): One delegation suggested clarifying that the judgements and other documents mentioned there should be signed not only by the Registrar but also by the President of the Tribunal. Other delegations contradicted this view by pointing out that Article 27 deals with the functions of the Registrar and not of the President. Moreover, Article 30, paragraph 4, of the Tribunal Statute did already contain the provision that judgements shall be signed by the President and by the Registrar.

Another proposal that the Registrar should countersign judgements, etc. was countered on the grounds that under Article 30, paragraph 4, of the Tribunal Statute, the Registrar shall "sign" the judgements and that this term should therefore be retained.

There was also a suggestion to bring the French text in line with the corresponding text of the Rules of the International Court of Justice.

Besides, it was pointed out that the correct reference in that subparagraph should be subparagraph (f) rather than (e).

subparagraph (j): A suggstion was made that instead of reference to the "financial procedures" of the Tribunal, reference should be made to the "financial directives".

subparagraph (l): The proposal was made that the Registrar should assist in maintaining relations not with bodies and conferences concerned with the codification and progressive development of international law as a whole, but only with those concerned with the codification and progressive development of the Law of the Sea. This idea was contested on the grounds that the Tribunal, in the light of its comprehensive functions, should not follow only the codification and progressive development of the Law of the Sea because it would have to keep abreast of the development of international law in a broader sense. A proposal was made to add to the present text the words "in particular, the Law of the Sea".

There was also a suggestion that the Tribunal should maintain relations not only with the International Court of Justice but also with other arbitral bodies.

No suggestions were made with respect to the other subparagraphs of paragraph 1 or to paragraph 2.

50. Concerning paragraph 3, it was suggested that rather than the Registrar being responsible to the Tribunal, he should be responsible to the President of the Tribunal.

Article 28

51. In discussing that draft article, reference was again made to the post of Assistant-Registrar. If Article 24 were to be adopted in its present version, some delegations considered it necessary to name, in that article also, the Assistant-Registrar. One delegation repeated its position that a Deputy-Registrar should be responsible for the Sea-Bed Disputes Chamber and that Article 28 should refer to the Registrar and 2 Deputy-Registrars. This suggestion was countered by other delegations who were against the creation of such a post, and who preferred Article 28 to remain as it was now.

Article 29

52. The only comment on this article was a suggestion that the reference to the Assistant-Registrar should be deleted.

Article 30

53. In discussing this article, one delegation wanted the different languages brought in line to avoid the interpretation that the officer concerned should have additional rights to those referred to in Article 29 of the Court's Rules. Another delegation suggested that the officer should be entitled to be represented by Counsel at the inquiry. It was suggested by a delegation that the article should also cover voluntary resignations.

54. In the course of the first reading of Parts I and II of the present Draft Rules, a number of other proposals of a drafting nature were made which were submitted to the Secretariat in writing. They involve, above all, suggestions to bring the text of one language in line with the texts of the other languages, and proposals designed to make the wording clearer without affecting the substance in any manner. Since this is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. Should any delegation feel that an important matter has been omitted, the Chairman would appreciate being informed.

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Special Commission 4
Third session
Kingston, Jamaica, 11 March-4 April 1985

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Addendum

Part III. Proceedings in disputes

Sections A, B and C

Section A. Declarations, agreements, communications and notices

Subsection 1. Declarations and agreements

Article 31

1. Article 31 was introduced by the Secretary who explained the basis of the formulations and the requirements of the Tribunal with regard to declarations accepting its jurisdiction. They were substantially different from the case of the International Court of Justice, where the acceptance of its jurisdiction was governed by Articles 35 and 36 of its Statute. Declarations of acceptance of the jurisdiction of the Tribunal by States Parties were covered by article 287 of the Convention. They were to be deposited with the Secretary-General of the United Nations along with any revocations or modifications thereof. The statute of the Tribunal did not call on the Secretary-General of the United Nations to submit those declarations to the Tribunal. However, since it seemed necessary for the Registrar to maintain them with the records of the Tribunal, provision for that was made in article 31, paragraph 1. In addition to all declarations by States parties to the Convention, the provision would also cover international organizations constituted by States, as referred to in annex IX, article 1, of the Convention. The deposit of their declarations accepting the jurisdiction of the Tribunal was provided for in article 7 of annex IX of the Convention.

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2. Since the jurisdiction of the Sea-Bed Disputes Chamber was compulsory for all States which were parties to the Convention (article 287, para. 2), no special or general declaration would be required to confer jurisdiction on the Sea-Bed Disputes Chamber in disputes between States Parties concerning the interpretation or application of part XI of the Convention and the related annexes with respect to activities in the Area. The Sea-Bed Disputes Chamber also had competence in disputes involving the Authority and parties to a contract, whether they be States Parties, the Enterprise, State enterprises or natural or juridical persons as referred to in article 187. For those reasons, no provision was made for declarations by States Parties in that connection. However, other entities would have to make a declaration.

3. The Convention also provided that the Tribunal should be accessible to parties to a dispute concerning an international agreement which was related to the purposes of the Convention. Such access to the Tribunal would be governed by the terms of that particular international agreement. Articles 21 and 22 of the Tribunal dealt with the jurisdiction of the Tribunal in such cases. Where such an international agreement conferred jurisdiction on the Tribunal, then the parties to that agreement might have recourse to the Tribunal to resolve their disputes. Such access to the Tribunal might be open to entities other than States Parties. Paragraphs 2 and 3 of draft article 31 elaborated on the access of States which were not parties to the Convention and set out the requirement that they make declarations accepting the jurisdiction of the Tribunal with respect to disputes governed by such international treaties or agreements. Those two paragraphs would call on such States to comply in good faith with the decisions made by the Tribunal in such cases and to accept the obligations as to the expenses of the Tribunal.

4. Where entities other than States Parties, or States which were not parties to the Convention, were parties to a dispute submitted to the Tribunal in accordance with such an international agreement, then their access to the Tribunal would be governed by article 291, paragraph 2, of the Convention and provision was made for their declarations in paragraph 4 of article 31.

5. Paragraph 5 of article 31 made the Registrar of the Tribunal the custodian for all declarations other than those referred to in paragraph 1 of article 31 which were covered in article 287 of the Convention. Paragraph 5 of article 31 went on to indicate to whom such declarations should be communicated.

6. Paragraph 6 left it to the Tribunal to decide on the validity and effect of such declarations accepting the jurisdiction of the Tribunal which were required to be made under article 31.

7. The functions of the Registrar in that regard were to be found in draft article 27, paragraph 1(c), of the draft rules of the Tribunal.

8. When considering article 31, it was proposed and widely supported by several speakers that subsection 1, Declarations and agreements, should be divided into 2 separate articles, one of which could cover declarations and the other the agreement.

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9. In discussing paragraph 1, delegations pointed out that the declarations made by States Parties under article 287 of the Convention would be in the custody of the Secretary-General and could not be concurrently in the custody of the Registrar. Therefore, what the Registrar needed to keep in the records of the Tribunal was the duly authorized or certified copies of the same. The view was also expressed that copies of the other declarations made under article 287 of the Convention accepting other forums for the settlement of disputes should also be available with the records of the Tribunal for the reason that they could have a bearing on declarations accepting the jurisdiction of the Tribunal. It was suggested that the Registrar of the Tribunal should obtain authorized or certified copies of all those declarations from the Secretary-General of the United Nations. Since the responsibility of the Secretary-General as a depository of the Convention and for those declarations under article 287 did not call on him to submit copies to the Tribunal, it would appear that some arrangement would have to be arrived at whereby that can be effected since the Tribunal's rules could not impose obligations on the Secretary-General.

10. In discussing paragraphs 2 and 3, questions were raised as to why the text of the paragraph took the form of an explanatory statement. It was proposed that the paragraph should clearly spell out what was contemplated rather than seeking to explain the possibilities. Such might have been appropriate to the International Court of Justice, but it was not called for in the case of the Tribunal. Another view expressed was that, since the agreements themselves would provide the terms of the agreement submitted to the Tribunal, there would be no need for declarations in the case of agreements. The opinion was expressed that the reference, in article 31(2), to particular agreements might go beyond what was contemplated in article 288(2). It was explained that, since it was the agreement itself which called for the submission of disputes to the Tribunal and since that might take various forms, some clarification was required. Where the agreement was clear and categoric, then there might be no need for a declaration. On the other hand, where the agreement was merely permissive or qualified in any way, then there would be a need for a declaration accepting jurisdiction and undertaking to comply with the decision and the obligations.

11. The question was raised as to whether paragraph 2, because of the manner of its formulation, permitted optional exceptions to the acceptance of jurisdiction under article 287.

12. The view was also expressed that paragraphs 2 and 3 should be read together, which made the position clear as to the impact of paragraph 2.

13. As regards paragraph 4, where it was pointed out that declarations by entities other than States Parties, or States which were not parties to the Convention as provided for in paragraph 3, the Tribunal had jurisdiction with respect to such entities as were parties to a dispute under part XI of the Convention. However, another delegate was of the view that the reference to entities in that paragraph should be qualified by using the formulation "... entities, especially those referred to in part XI, ...".

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14. Paragraph 5 was commented on with reference to "certified true copies" of the declarations. It was suggested that since the Convention referred only to "copies" without qualification, the same formulation should be used in that case.

15. With reference to paragraph 6, it was suggested by one delegation that reference to "agreements" should be added to the reference to "declarations". There were conflicting views as to whether the Tribunal should be empowered to pronounce itself on the validity of declarations, which was considered as a matter relevant to the jurisdictional issue.

16. Others desired the maintenance of those provisions because in their view it should be possible for the Tribunal to decide the issue in advance. It was suggested that that issue be deferred for later consideration.

Subsection 2. Communications and notices

Article 32

17. Concerning draft article 32 dealing with communications, no suggestions were made.

Article 33

18. There was a proposal to add a new paragraph to the effect that the copies of any notice or revocation of declarations accepting the jurisdiction of the Tribunal in accordance with article 287 of the Convention should be maintained with the records of the Tribunal by the Registrar.

19. Another comment referred to the French text which would have to be brought in line with the text of Article 44 of the Statute of the International Court of Justice.

Section B. The composition of the Tribunal for particular cases

Article 34

20. In discussing this draft article, several delegations pointed out that it should also cover a situation where the President of the Tribunal was a national of a State member of an international organization which was a party to a case.

21. Attention was also drawn to the possibility of the Authority being a party to a dispute before the Tribunal. In that connection, the Chairman recalled the note at the end of working paper 2 which stated that the draft rules of the Tribunal did not include provisions covering cases where intergovernmental organizations (referred to in article 305, para. 1(f), of the Convention), consortia or entities other than States were parties to a dispute. It was agreed that appropriate rules to cover such cases would have to be formulated after the Commission had finished the first reading of the draft rules.

Article 35

22. No suggestions were made with regard to this article.

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Article 36

23. There was a suggestion that the article should be simplified and brought in line with the text of article 8 of the statute of the Tribunal.

24. Another proposal was for the deletion of the reference to paragraph 4 of article 8 of the statute because that paragraph merely covered procedural matters.

25. The new formulation suggested for paragraph 1 of article 36 was that, in case of any doubt arising as to the application of article 8, paragraph 1, of the statute or in case of a disagreement as to the applicatiion of article 8, paragraphs 1 and 3, of the statute, the President should inform the members of the Tribunal. According to that view, a majority of the members of the Tribunal, excluding the member concerned, should be the required majority to decide the issue.

Article 37

26. One delegation suggested that the time-limits referred to in paragraphs 1, 2 and 3, of article 37, and in paragraph 1 of article 38, should be fixed in such a manner as to ensure that a party who was supposed to propose a member ad hoc could not delay the proceedings. Another suggestion was for more precise language in paragraph 1 in order to prevent more than one member of the same nationality sitting on the bench in a particular case.

Article 38

27. It was pointed out that, in paragraph 2, it was not clear as to what "other objection[s]" were contemplated. Another delegation suggested that the objection should be confined to the appointment of a single judge ad hoc which was the most likely objection that could arise.

Article 39

28. There were suggestions to bring the French text in line with the English text. One delegation felt there was a need to clarify in the text that the choice of a member ad hoc was a right and not an obligation.

29. There was a request for clarification as to what would happen to a member ad hoc, chosen in the conditions mentioned in paragraph 1, if the situation referred to in paragraph 5 occurred.

Section C. Proceedings before the Tribunal

Subsection 1. Institution of proceedings

Article 40

30. In discussing this draft article, attention was drawn to the problem of chambers upholding decisions of each other and it was suggested that it should be made clear in the rules. The suggestion was made by some delegations to delete the

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words "as far as possible" in the first line of paragraph 2 because they believed that the application must specify the legal grounds upon which the jurisdiction of the Tribunal was based. The suggestion was also made to amend the last line of paragraph 3 to reflect the fact that the process of authenticating was done not only by foreign ministries but also by other government authorities in different countries.

31. It was suggested that article 40 should be brought into conformity with article 287 of the Convention, since that article permitted declarations accepting the jurisdiction of the Tribunal either generally or for a particular case. In paragraph 6 the reference to part IV should be more specific as it related to those rules.

32. Further discussions on paragraph 6 were postponed in view of the contents of the note at the end of the draft articles.

Article 41

33. Delegations' attention was drawn to the interrelationship between that draft article and draft article 31, paragraphs 1-5. It was therefore suggested that if the draft article was left as proposed, then a drafting change should be made in draft article 31 so that it no longer provided for notification as soon as agreements were concluded.

Article 42

34. No suggestions were made with regard to this article.

Article 43

35. In discussing this draft article a suggestion was made that, in view of the fact that a clear distinction was not made here as to whether the phrase "entities other than States" covered both the States which were not parties to the Convention and other entities, discussions on that article be deferred since a decision had already been taken to defer discussion on draft article 40, paragraph 6.

36. It was also suggested that, during the first reading of the draft articles, delegates should confine themselves to discussions concerning only States which were parties to the Convention.

Article 44

37. It was suggested that draft article 44 be deleted since it neither added nor subtracted anything from article 24 of the statute of the International Tribunal for the Law of the Sea.

38. One delegation proposed that the words "States parties" should be deleted and replaced by the words "All Parties".

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Article 45

39. No suggestions or proposals were made regarding this draft article.

Article 46

40. In discussing this draft article some delegations felt that paragraph 3, which dealt with privileges and immunities of agents and counsel, should be moved to draft article 47 which dealt with that matter. Other delegations suggested that the question of privileges and immunities should not be dealt with in the rules of procedure but should be dealt with in a separate document such as the headquarters agreement, since it was necessary that the host and any other country where the Tribunal might sit should have undertaken to grant those privileges and immunities.

41. One delegation suggested that not only was it necessary to give immunities and privileges on paper but what was needed was to guarantee that the agent or counsel representing a party to a dispute was given entry permission quickly by the host Government so that the agent/counsel could have immediate access to the Tribunal. The point was also made that not only should the members of the Tribunal, counsel and agents be accorded privileges and immunities but that expert witnesses should also be accorded the same privileges and immunities.

42. It was suggested that paragraph 4 be deferred for discussion until draft article 88 was discussed. It was also proposed that the secretariat should draft rules relating to the question of the prompt release of vessels taking into account the informal suggestions submitted.

Work programme for the third session

43. The Chairman proposed that for the third session in Kingston, Jamaica, the first reading of the draft articles should be continued. A request was made that, in future, introductions to draft articles should be prepared by the secretariat and, if possible, circulated to delegations before the articles were discussed in the Special Commission.

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CONVENTION ON THE
LAW OF THE SEA

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special commission 4
Third session
Kingston, Jamaica: 11 March-4 April 1985

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Part III. Proceedings in Disputes

Sections A, B and C

Corrigendum

Page 2, article 31, paragraph 1, line 2

For States parties read States Parties

Page 2, article 31, paragraph 3, line 5

For the Tribunal read the statute of the Tribunal

Page 2, article 31, paragraph 4, line 1

For States which were not parties read States not parties

Page 2, article 31, paragraph 4, line 2

For were parties read but parties

Page 3, article 31, paragraph 10, line 15

After permissive or insert was not

/...

Page 3, article 31, paragraph 13, first line

After declarations insert can be made

Page 4, article 33, paragraph 18, line 2

For any notice or revocation read any notice of revocation

Page 5, article 36, paragraph 25, line 4

For paragraphs 1 and 3 read paragraphs 1-3

Page 5, article 39, paragraph 29, last line

For paragraph 5 occurred. read paragraph 5 of article 37 occurred.

Page 6, article 40, paragraph 31, last line

For related to those rules, read related to these rules.

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LOS/PCN/SCN.4/L.3
3 April 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Third session
Special Commission 4

CHAIRMAN'S SUMMARY OF FURTHER DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

1. The Special Commission decided, in accordance with the recommendations of its bureau, to continue its article by article examination of the Draft Rules of the Tribunal (LOS/PCN/SCN.4/WP.2), proceeding in accordance with its decision as recorded in document LOS/PCN/SCN.4/L.2, paragraph 1.

Part III. Proceedings in disputes

Section C. Proceedings before the Tribunal

Subsection 2. Representation of parties

2. Articles 47 to 49 of the Draft Rules of the Tribunal, which cover privileges, immunities and facilities of agents, counsel and advocates of parties before the Tribunal, follow the practice of the Court of Justice of the European Economic Community and have no equivalent in the rules of the International Court of Justice (ICJ).

3. Article 42(3) of the ICJ Statute, which forms an integral part of the Charter of the United Nations, stipulates that agents, counsel and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. The Law of the Sea Convention does not contain provisions on privileges, immunities and facilities of agents, counsel and advocates of parties before the Tribunal, which can either be States or entities other than States. Initially, the discussion on Subsection 2 focused on whether or not such provision could be included in the Rules of the Tribunal in the absence of provision in the Convention.

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Articles 47-49

5. Attention was drawn to the existence of three different categories of such privileges, immunities and facilities of parties before the Tribunal, i.e. those which would be granted by the host country of the Tribunal, those applicable if the Tribunal sat and exercised its functions away from its seat as provided for in article 1(3) of its Statute, and those accorded by other States to ensure the appearance of agents, counsel and advocates before the Tribunal, for instance, when they were in transit.

It was a widely held view that the privileges, immunities and facilities in all three categories could only be claimed if the States concerned had expressly agreed to grant them, since they affected major sovereign rights of States. Accordingly, they could not be unilaterally established by the Tribunal, which, under Article 16 of its Statute, adopted its own rules and might amend them at any time without the consent of States Parties. It did not appear to be possible to deal with this question in the Rules of the Tribunal.

6. There was agreement that the first category of privileges and immunities, i.e., those to be granted by the host country, would have to be dealt with in the headquarters agreement.

7. At the request of the Special Commission, the Special Representative of the Secretary-General provided a document (LOS/PCN/SCN.4/CRP.6) containing the relevant information on the manner in which provision was made for the second and third categories of privileges, immunities and facilities for parties before the International Court of Justice and other international courts.

8. There was widespread agreement that a corresponding arrangement should be made for parties before the Tribunal. A suitable recommendation could therefore be made in the report to be presented to the meeting of States Parties in accordance with paragraph 10 of Resolution I, to enable it to take the necessary action.

9. The Special Commission agreed that these matters could also be taken up at a later stage of its work in the context of agenda items 4, on the Headquarters Agreement and 2, on arrangements concerning privileges and immunities, and decided to revert to draft articles 47, 48 and 49 after the substantive discussion on the subject, when it could also discuss whether there was a need for some kind of general provision on privileges, immunities and facilities in the Rules.

Article 50

10. Some delegations were of the view that the article conferred too much power on the Tribunal and the chambers, since even the ICJ Rules did not provide for the exclusion of a counsel or advocate from the proceedings. Others were of the view that such a provision should be retained, since it was designed to protect the dignity of the Tribunal. Some felt that the article should set forth in detail the procedure to be followed for the exclusion of an advocate or counsel, who should be given an adequate opportunity to defend himself. It was also

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suggested that a differentiation should be made between the Tribunal and the chambers concerning such decisions.

11. It was noted that the terms "order" and "decisions" should be harmonized.

Article 51

12. There was general agreement that the article should be deleted, since university teachers enjoyed the same right of audience as counsel and advocates.

Subsection 3-5

13. Introducing Subsections 3 to 5, the Secretary pointed out that article 27 of the Statute empowered the Tribunal to "make orders for the conduct of the case, decide the form of and time within which each party must conclude its arguments, and make all necessary arrangements connected with the taking of evidence". The Statute did not contain specific provisions on written and oral proceedings; thus articles 52 and 53 of the Rules provided the framework under which articles 54-63 specified details of the written and oral proceedings.

Subsection 3. Proceedings

Article 52

14. This Rule closely follows Article 43 of the Statute of the International Court of Justice. It stipulates: that the proceedings shall consist of written and oral parts; what the written proceedings would consist of; that written communications should be submitted through the Registrar, in the order and within the time limits fixed; that a certified copy of every document of one party shall be communicated to the other; and lists of who may testify or address the Tribunal at the oral hearings.

15. One delegation suggested that the listing of written materials in paragraph 2 should not be definitive but only inclusive. Another suggested that the responsibility to certify the copies of such materials should be specified in paragraph 4. Others pointed out that precise provisions in that respect were already contained in article 62(1) and other articles.

16. One delegation proposed the re-arrangement of the order in which witnesses, experts, agents, counsel and advocates were listed, to reflect their significance in the proceedings. In reply to a question, the Secretary stated that the listing followed the usual sequence in which they would be called upon at the oral hearings. The view was expressed that the order of listing must not impair the flexibility of the Tribunal in determining the order in which they would participate in the proceedings.

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17. Another delegation said that the word "agents" should be replaced by "representatives". Others disagreed, pointing out that the term "agent" was defined in article 47, and was used in other international forums to designate a representative of a party.

Article 53

18. The proposal to replace "agents" by "representatives" was reiterated in connection with article 53.

Subsection 4. The written proceedings

19. Introducing the subsection, the Secretary drew attention to the fact that articles 54 to 63 closely followed articles 44 to 53 of the ICJ Rules.

Article 54

20. This article requires the President to ascertain the views of the parties on matters of procedure before the Tribunal makes orders, inter alia, on the time limits for and the number and order of, filing of pleadings.

21. One delegation wanted to simplify the procedure by having the orders made by the President rather than the Tribunal. There was opposition by a number of delegations, which felt that the orders were of major importance and should be made by the Tribunal collectively.

22. A suggestion to delete the reference to "persistent disagreement" in paragraph 4 was opposed by several delegations which were of the view that the Tribunal should only act in cases of persistent disagreement. It was further pointed out that the wording of the paragraph was fully consonant with the practice of ICJ, and there was no factual need to deviate from that practice.

Article 55

23. This draft article lays down the order which pleadings in a case begun by means of an application shall follow.

24. One delegation expressed a preference for the term "memorandum" rather than "memorial". In opposition some delegations argued that the terminology of the ICJ Rules should be closely followed. The need to harmonize the terminology of the English, French and Russian texts was expressed.

Article 56

25. Under this article, cases begun by the notification of a special agreement shall be governed by that agreement as to the number and order of pleadings unless the Tribunal, after ascertaining the views of the parties, decides otherwise.

26. While one delegation proposed that the decision called should be made by the President rather than the Tribunal, another delegation opposed the proposal on the grounds that the article as drafted followed article 46(1) of the ICJ Rules and that the matter required the collective decision of the Tribunal.

Article 57

27. This article provides that the Tribunal may at any time direct that the proceedings in two or more cases be joined, and that there be common action in proceedings and testimony.

28. One delegation asked whether the term "witnesses" also covered "expert witnesses" within the meaning of article 67 of the Draft Rules. The Secretary explained that the term "witnesses" used in article 57 was generic and could be interpreted to refer to both expert witnesses and ordinary witnesses.

Article 58

29. No comment was made on the draft article, which deals with time-limits for the completion of steps in the proceedings.

Article 59

30. The draft article, which explains the components and content of memorials and counter-memorials, drew no comment.

Article 60

31. No comment was made on the draft article, which stipulates which documents should be annexed to the original of every pleading and what form the documents should take.

Article 61

32. The draft article deals with situations where there is either an agreement or lack thereof between the parties as to the official language in which the pleadings shall be submitted.

33. The discussion was not complete, since the issue is closely linked with the number of official languages the Tribunal will have. While there was broad support for ensuring that, in the interests of efficiency and economy in the Tribunal's activities, the number of languages be limited, the following proposals were made concerning the number of official languages of the Tribunal:

(a) There should be only one official language;

(b) English and French could be used as official languages in line with the practice of ICJ;

(c) The Tribunal could use all six official languages of the United Nations and the Convention.

34. After the preliminary exchange of views there was a large measure of agreement that:

(a) The meeting of States Parties, which is to be convened in accordance with Article 4 of Annex VI of the Convention, should decide how many official languages the Tribunal should have;

(b) The Preparatory Commission should make a corresponding recommendation to that meeting;

(c) The draft should not be worded in a manner that could prejudge the decision on the official languages to be taken by the meeting of States Parties.

Article 62

35. This article makes provision for the filing of pleadings and stipulates what materials should accompany pleadings.

36. Some delegations called for a cross-reference to paragraph 4 of article 52, on the obligation of parties to transmit to the other party a certified copy of any pleading.

37. With regard to paragraph 2, dealing with the material date for filing of pleadings, one delegation proposed that it should be the date of the postmark. Others opposed the proposal on the grounds that the draft was fully concordant with the long-standing practice of the ICJ and international practice, and that changing it would give rise to uncertainty concerning the date. Although one delegation felt that the Tribunal should take cognizance of the postmark date, other delegations referred to article 54, paragraph 3, which provided the necessary flexibility for extension of time-limits.

38. The discussion on paragraph 3 focused on the last sentence, which provides that if the Registrar arranges for the printing of a pleading, such printing is to be done under the responsibility of the party in question.

39. While some delegations favoured the deletion of that provision, others suggested clarification that a party would bear no responsibility for any delay caused within the Tribunal if the party had complied with the time-limits. On the other hand, it was argued that the Registrar was not responsible for the reproduction of documents of the parties.

40. The Secretariat proposed that, in the light of the discussion and taking into account the recent practice of ICJ, changes to its rules and the efficiency of modern methods of duplicating documents, paragraph 3 should be redrafted with the term "reproduction" replacing "printing" in the first and last sentences of the paragraph as well as in the footnote (LOS/PCN/SCN.4/1985/CRP.6). The proposal was found to be acceptable.

41. The discussion of paragraph 4 focused on correction of any slip or error in any document with the consent of the other party or by leave of the President. The deletion of the term "slip" was suggested because it appeared to be covered by the term "error". Another proposal was to replace "slip" by "omission". Several delegations opposed any change, arguing that it would facilitate improper changes in substance. It was emphasized that the term "slip" or "error" meant typographical errors, and errors and other mistakes of that nature. Many delegations were of the view that for that reason, and considering that the term came from the two official language texts of the ICJ Rules, where it had never caused any problems, paragraph 4 should be kept as it stood. The Secretariat was requested to bring the other texts of the draft into line with the English and French versions.

Article 63

42. The article deals with the question to whom the Tribunal should make copies of pleadings and other documents available.

43. Regarding paragraph 1, the view was expressed that the question of access to pleadings and annexed documents by entities other than States required further study. One delegation proposed that only such papers should be accessible to such entities as related to disputes under Part XI, for which those entities had access to the Tribunal.

Subsection 5. The oral proceedings

Article 64

44. No comments were made on paragraph 1 concerning the fixing or postponing of the date for the opening of the oral proceedings.

45. Concerning paragraph 2, several delegations proposed that the priority accorded under article 84 that applied to the Tribunal when fixing the date for the opening or postponing of the oral proceedings should also include a reference to the Rules for the prompt release of vessels and crew.

46. Following proposals by several delegations, there was general agreement that paragraph 2 should be reverted to after the consideration of Provisional measures and of the prompt release of vessels and crew. One delegation proposed the inclusion of a provision that due regard should be given to the views of the parties.

47. Several delegations pointed out during the discussion of paragraph 3 that the President should not be given powers that usually belonged to the Tribunal as a collegium unless there was a most urgent need to do so. That view was not shared by others.

Article 65

48. The discussion focused on the requirement that the Tribunal, before deciding to sit and exercise its functions away from its seat if it so desired, should ascertain the views of the parties. Some delegations proposed that such a decision should be subject to the approval of the parties. Others opposed the proposal, arguing that under article 1 of its Statute, the Tribunal had an absolute discretion, which could not be restricted, to take that decision.

49. In that connection the question was raised whether Subsection 3 might not be a better place for the content of article 65, so as to cover both oral and written proceedings. Several delegations felt, however, that the present location of the article was the most appropriate, since there was no good reason why the Tribunal should sit elsewhere during the stage of written proceedings.

Article 66

50. The article relates to the submission of further documents to the Tribunal after the closure of the written proceedings. With regard to paragraph 1, on the conditions governing the submission of further documents, one delegation proposed that a deadline should be set for the submission of such additional documents. Another delegation favoured deleting the words "shall inform the Tribunal", arguing that the Tribunal was receiving all the pleadings anyway.

51. The Secretary explained that there was indeed a need for the Registrar to inform the Tribunal about the documents and copies handed in to the Registrar, who in turn communicated them to the other party, since that took place after the closure of written proceedings.

52. Concerning paragraph 2, which permits the Tribunal, in the absence of consent by the other party, to authorize the production of a document if it considers the document necessary, one proposal was to merge paragraphs 1 and 2; however, some delegations felt that there was no need for paragraph 2 since the submission of a document after the closure of written proceedings was to take place only with the consent of the other party or the Tribunal. Several delegations saw no need to change the wording.

53. There were no interventions on paragraph 3 which provides that the opposing party is given an opportunity to comment on any new document produced and to submit documents in support of its comments.

54. In discussing paragraph 4, which provides that during oral proceedings no reference may be made to any document which has not been produced or which is not readily available, some delegations proposed a cross-reference to article 52 or 55 of the Draft Rules, since otherwise the paragraph might be interpreted to exclude reference to documents submitted under those articles. Others objected to that suggestion on the grounds that paragraph 4 was an exceptional clause which precisely reflected what it meant to say.

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55. Some delegations favoured the deletion of paragraph 5, which provides that the application of article 66 shall not in itself constitute a ground for delaying the opening or the course of the oral proceedings. Other delegations favoured retaining it, since it was based on the sound principle of preventing a delay in the oral proceedings. While paragraph 1 gave the Tribunal the opportunity of postponing the opening of oral proceedings, paragraph 5 was needed to close the door on possible delay. A further argument was that the interpretation of the rules of the Tribunal would be inspired by the interpretation of the ICJ Rules, and the absence of the rule would imply the opposite.

Article 67

56. This article provides for parties to make available information on evidence and on witnesses or expert witnesses to be called. A number of delegations proposed the replacement of the term "expert witnesses" by the general term "experts". Attention was drawn to the corresponding article 57 of the ICJ Rules, where only the terms "witnesses" and "experts" were used. It was felt that the distinction between experts appointed to sit with the Tribunal and experts called by the parties to testify would become apparent from the context.

57. The proposal was opposed by some delegations which stressed the need for distinct terms to differentiate the two categories of experts referred to in the Draft Rules.

58. It was proposed that experts who would be designated under article 289 of the Convention should be referred to as "experts under article 289 of the Convention" while those meant in article 67 of the Draft Rules should simply be referred to as "experts". This was not acceptable to some others. There was general agreement that the term "expert witnesses" should not be used, as a number of delegations pointed out that it was unknown in their legal systems.

59. It was finally agreed that the Secretariat should submit a redraft of article 67 which would clarify the issue. Corresponding adjustments would be required wherever the term occurred.

Article 68

60. This article deals with the right of the Tribunal to settle the order in which the parties will be heard, the recording of evidence and the hearing of counsel and advocates.

61. Some delegations felt that in redrafting article 67 account would have to be taken of article 68, paragraph 2, which used the term "expert witnesses".

Article 69

62. The article provides that hearings in the Tribunal shall be public, unless the Tribunal decides otherwise, or unless the parties demand that the public be not admitted.

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63. One delegation proposed a redrafting of the text in such a way that even if the parties made such a request, the decision would be taken by the Tribunal. Several delegations opposed the proposal, arguing that article 69 was linked with article 26, paragraph 2 of the Statute of the Tribunal, which was worded identically, and was, moreover, in accord with article 59 of the ICJ Rules. If, therefore, a change was deemed necessary it could only be the insertion of a reference to article 26, paragraph 2 of the Statute.

Article 70

64. No suggestions were made with regard to this article, which deals with the oral statements made on behalf of the parties.

Article 71

65. This article concerns the rights of the Tribunal and each of its judges during the hearing and, in particular, the right to put questions to the agents, counsel and advocates.

66. One delegation proposed the insertion after the word "hearing" in paragraph 1 of the words "pursuant to article 27 of the Statute of the Tribunal".

Article 72

67. The article provides that the Tribunal may call upon the parties at any time to produce such evidence or to give such explanations as the Tribunal may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.

68. One delegation suggested the inclusion in paragraph 1 of a reference to article 27 of the Statute of the Tribunal.

69. Another delegation said that paragraph 2, which makes provision for the attendance of witnesses or expert witnesses to give evidence in the proceedings, should be combined with paragraph 1 of article 73 on account of its close interrelationship with the matters covered there.

70. The Secretariat's attention was again drawn to the term "expert witnesses".

Article 73

71. This article sets out the procedures to be followed in calling witnesses, including the right of the Tribunal or its president to examine witnesses otherwise than before the Tribunal itself.

72. Some delegations supported the proposal to combine paragraph 1 with article 72, paragraph 2. Other delegations objected, arguing that if the two paragraphs were merged the President would be given powers also with regard to arrangements for the attendance of witnesses and expert witnesses, which was inappropriate.

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73. One delegation said that, for the sake of consistency, either the term "proprio motu" should be translated into all the languages or the Latin term should be used throughout.

74. Some delegations proposed that the examination of witnesses should be confined to the times when the whole Tribunal was sitting, in order to avoid giving its President excessive powers. Others said that paragraph 2 should remain as it stood, since article 26, paragraph 1, of the Statute provided that the hearing should be under the control of the President or the Vice-President.

Article 74

75. The article contains the wording of the solemn declarations to be made by the witness before giving evidence and by the expert witness before making any statement.

76. One delegation said that in some languages of the Draft Rules the text referred to an oath but should refer to declarations to reflect the current practice.

Article 75

77. One delegation suggested specifying the order in which witnesses were to be examined.

78. Another delegation, referring to the first sentence, proposed the rearrangement of the English text for clarity.

79. Concerning the last sentence, which provides that before testifying witnesses shall remain out of court, one delegation proposed that it should also refer to expert witnesses. By contrast, other delegations felt that an expert witness testified as to his expertise, and that the rule should therefore not apply to expert witnesses.

Article 76

80. No suggestions were made concerning this article, which deals with the place where evidence may be obtained.

Article 77

81. This article sets out the conditions under which the Tribunal is entitled to arrange for an enquiry or an expert witness opinion.

82. One delegation drew attention again to inconsistencies in the use of the terms "expert witness's opinion", "expert opinion" and "expert". The Secretariat was requested to take that into account when redrafting article 67 in connection with the term "expert witnesses".

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Article 78

83. This provision relates to the remuneration of witnesses and expert witnesses who appear at the instance of the Tribunal and of persons appointed by it to carry out an enquiry or give an expert opinion.

84. Several delegations proposed that it be redrafted to make it clearer that only those called and acting at the instance of the Tribunal should be remunerated from the funds of the Tribunal.

85. While one delegation proposed the addition of the words "if the Tribunal so decides", other delegations felt that article 78 should not be re-drafted.

Article 79

86. This article deals with the relationship between the Tribunal and public international organizations with regard to information relevant to cases before the Tribunal.

87. Several delegations proposed that the term "public international organizations" should be replaced by either "international organizations" or "intergovernmental organizations". Others said it should be made clear that the article should not apply to international organizations as defined in article 1 of Annex IX to the Convention. Moreover, some delegations proposed that it should not apply to international organizations as defined in Annex IX, article 1, which were parties to the Convention. Other delegations were not prepared to accept that additional qualification. One delegation was of the view that the article should only apply to intergovernmental organizations of a universal character.

88. As a result of an exchange of opinions it was suggested that the Secretariat should prepare a reformulation for consideration. The suggestion presented in LOS/PCN/SCN.4/1985/CRP.7 was considered, and it was agreed that article 79, paragraph 4, should be redrafted accordingly.

89. A number of delegations proposed the deletion of the reference in paragraph 1 to article 67 of the Draft Rules, because article 67 dealt with evidence while article 79 related to the question of information. However, after the Secretary explained that the information would be provided in the same manner as evidence, the cross-reference was not objected to.

Article 80

90. This article relates to the language in which speeches and statements are to be made and evidence to be given at the hearings.

91. A number of drafting proposals were made on paragraphs 1-3.

92. With regard to paragraph 4, which stipulates that before first interpreting in a case interpreters provided by a party shall make a declaration in open court, one delegation proposed the deletion of the words "in open court".

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Article 81

93. The article contains various provisions on the verbatim record and minutes of every hearing to be prepared, and on their status.

94. One delegation proposed that to prevent unduly high expenditures on the Tribunal, only summary records, rather than verbatim records, should be kept of every hearing. Should however the parties to a dispute ask for verbatim records, they could be prepared at the expense of the parties. Other delegations were unwilling to accept the proposal, arguing that verbatim records were indispensable in order to avoid unilateral interpretations and to guard against controversies that might arise later on.

95. It was suggested that paragraph 6, which provides that minutes shall be made at each hearing and that those minutes alone shall be authentic, be placed at the beginning of article 81 since it provided the juridical basis of the article. It was also proposed that paragraph 6 should be merged with paragraph 1.

96. Paragraph 7 provides that one certified true copy of the eventual corrected transcript, signed by the President and the Registrar, shall constitute the authentic minutes of the sitting for the purposes of paragraph 6. It was proposed to bring the paragraph into line with paragraph 6 by saying "... signed by the Registrar and the President".

Article 82

97. The article stipulates that if, at the request of the Tribunal, any written reply by a party to a question or any evidence or explanation supplied by a party is received by the Tribunal after the closure of the oral proceedings, it shall be communicated to the other party, which shall be given the opportunity of commenting upon it, and that, if necessary, the oral proceedings may be reopened for that purpose.

98. Some delegations proposed that the article be placed before article 81 in order to make clear that its provisions are part of the oral proceedings. Opposing the proposal, other delegations argued that article 82 was appropriately placed in the Draft Rules since it related to the time after the closure of the oral proceedings.

99. At the end of the discussion on Section C of the Draft Rules one delegation made a proposal concerning the harmonization of the jurisdiction of the Tribunal and its chambers. In its opinion a possible solution might be to insert in the rules of procedure a new article providing for a kind of harmonization procedure when there were different views between either two or more chambers or between a chamber and the Tribunal. A conceivable way of

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meeting such a situation could be for the Chamber to relinquish jurisdiction to the Tribunal in order to achieve a continuous and reliable development in the interpretation of the Convention.

100. Several delegations pointed to the fact that the matter had been examined in detail by the Law of the Sea Conference and that there had been agreement then not to insert such a provision in the Convention. The opinion was expressed that the problem could not be resolved by the Preparatory Commission since it was ultra vires the Commission's mandate. Some delegations held the view that the proposal pointed to a real problem and that the Commission should give thought to it. There was widespread agreement however that time was needed to reflect on the proposal, and that it should be taken up at a later stage of the consideration of the Draft Rules. A decision would then have to be taken as to whether the insertion of such a provision in the Draft Rules was permissible under the Convention.

101. In the course of the article by article examination of Part III, Section C of the Draft Rules, a number of other proposals of a drafting nature were made which were submitted to the Secretariat in writing. They involved, above all, suggestions to bring the text of one language in line with the texts of the other languages, and proposals designed to make the wording clearer without affecting the substance in any manner. Since this is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. Should any delegation feel that an important matter has been omitted, the Chairman would appreciate being informed.

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Special Commission 4
Geneva, 12 August-4 September 1985

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Addendum

Part III. Proceedings in disputes

Section D. Incidental proceedings

Subsection 1. Provisional measures

1. Introducing this subsection, the Secretary pointed out that in formulating the draft articles of this subsection the Secretariat had closely followed the wording of article 290 of the Convention on the Law of the Sea. Article 290, paragraphs 2 to 6, of the Convention had no comparable provisions in the Statute of the International Court of Justice (ICJ) and in some respects the provisions of article 290 of the Convention is stronger than Article 41 of the ICJ Statute. Rules 83 to 88, to a certain extent, correspond to Articles 73 to 78 of the Rules of Court of the International Court of Justice. Article 86 covers only Article 76, paragraph 2, of the ICJ Rules. Article 87 is similar only to Article 77 of the ICJ Rules. The primary difference arises from the fact that article 290 of the Convention is different from the corresponding provisions in the ICJ Statute.

Article 83

2. This article contains the criteria to be met in making a request for the prescription of provisional measures.

3. Concerning paragraph 1 one delegation proposed the addition of a reference to the Tribunal to clarify to whom the written request should be made.

4. A number of other delegations pointed to the need to make it quite clear in paragraph 1 that the dispute must have been duly submitted before the Tribunal can exercise its jurisdiction and prescribe provisional measures and in that connection one delegation proposed a formulation.

5. However, other delegations were of the view that the text should be left as currently drafted or that a simple reference should be made to article 290, paragraph 1, of the Convention.

6. No comment was made on paragraph 2.

Article 84

7. This article covers several rules of procedure applicable when a request for the prescription of provisional measures is made.

8. There was agreement that this paragraph should be discussed in conjunction with article 88 B in view of the fact that the priority established in paragraph 1 of this article is closely related to paragraph 1 of article 88 B, which deals with the prompt release of vessels (see LOS/PCN/SCN.4/WP/2/Add.1).

9. Some delegations proposed the redrafting of paragraph 2 in order to harmonize it with article 25, paragraph 2, and article 15, paragraph 3, of the statute of the Tribunal as well as article 16 of the present rules. They felt that it was necessary to provide not only for a case where the Tribunal is not in session but also where a sufficient number of its members is not available to constitute a quorum, and to make it quite clear that in both cases the Chamber of Summary Procedure formed under article 15, paragraph 3, of the statute and article 16 of the present rules shall be convened for the purpose of proceeding to a decision on the request as a matter of urgency. Accordingly, the Secretariat suggested a redraft (see LOS/PCN/SCN.4/1985/CRP.10), which met with almost unanimous approval.

10. One delegation felt, however, that the redraft of paragraph 2 should follow the wording of article 25 of the statute.

11. As for paragraphs 3 and 4 of article 84 it was proposed that specific mention be made of the Chamber of Summary Procedure.

Article 85

12. No suggestions were made concerning this article, which deals with the consequences of the rejection of a request.

Article 86

13. No proposals were submitted on article 86, which concerns requests for the modification or revocation of provisional measures.

Article 87

14. This article deals with the communication of measures indicated by the Tribunal.

15. Some delegations suggested the deletion of the article because they felt that it was a mere repetition of article 290, paragraph 4, of the Convention. One delegation deemed it adequate to simply make reference to article 290, paragraph 4 and to add a reference to "notifications".

16. Others argued, however, that in order to establish conformity with the wording of the other articles of this subsection all that was required was to replace the word "indicated" by the word "prescribed". The rest of the article should be left as it stands.

Article 88

17. Article 88 stipulates that the Tribunal may request information from the parties on any matter connected with the implementation of any provisional measures it has prescribed. No comment was made concerning this article.

Subsection 2. Preliminary proceedings

Article 89

18. Article 89 provides that when an application is made in respect of a dispute referred to in article 297 of the Convention, the Tribunal should, at the request of a party, or may, proprio motu, determine whether prima facie the application is well founded. Paragraph 2 provides that when the Tribunal finds that the claim constitutes an abuse of legal process or is prima facie unfounded, it should order the recording of the discontinuance of the proceedings and stipulate that the case not be entered in the General List.

19. Introducing this article, the Secretary pointed out that article 294 was formulated by the Conference as a compromise between those who opposed any compulsory settlement of disputes concerning the exclusive economic zone and others who favoured it.

20. In the discussion some delegations proposed that article 294, paragraph 2, which lays down the principles of preliminary proceedings, should be further specified in the rules of procedure.

21. Some delegations could not accept the final provision of article 89, paragraph 2, according to which the Tribunal shall make an order directing that the case be not entered in the General List. They rather felt that any application made under article 294 must be entered in the General List according to article 27, paragraph 2, of the draft rules of the Tribunal before the latter can make a determination pursuant to article 89, paragraph 1.

22. A number of delegations proposed not to use the word "discontinuance" in article 89, paragraph 2. They argued that the discontinuance of a case provided for in articles 99 and 100 of the draft rules was brought about on the initiative of the parties to a dispute while in article 89 of the draft rules it was a matter of specifying the powers of the Tribunal pursuant to article 294 of the Convention.

23. One delegation proposed to bring article 89, paragraph 2, into full harmony with article 294, paragraph 1, of the Convention and therefore to utilize that language.

24. One delegation suggested replacing the term "order" by the term "judgment" since in its view the proceedings covered by article 89 came under the provisions of article 30 of the statute of the Tribunal. In reply the Secretary made it clear that what was involved here was the conduct of the case within the meaning of article 27 of the statute under which the Tribunal shall make orders.

25. Several delegations suggested that in accordance with article 294, paragraph 1, of the Convention, article 89, paragraph 1, should be supplemented to the effect that the Tribunal also had to determine whether a claim constituted an abuse of legal process.

26. Another delegation was of the view that article 89 should be brought into harmony with article 294 of the Convention, in the sense that under that article the Tribunal had to examine whether the claim constituted an abuse of legal process or whether it was prima facie well founded. This was in conflict with article 89 since the latter referred to the determination of the application.

27. Another delegation proposed that article 89 should also provide for the possibility of an application under article 297 of the Convention objecting to a request submitted under article 294, paragraph 1, of the Convention.

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Special Commission 4
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CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The Special Commission decided, in accordance with the recommendations of its bureau, to continue its article by article examination of the Draft Rules Of the Tribunal (LOS/PCN/SCN.4/WP.2), commencing with draft article 90 and proceeding in accordance with its earlier decision as recorded in document LOS/PCN/SCN.4/L.2, paragraph 1.

Part III. Proceedings in disputes

Section D. Incidental proceedings

Subsection 3. Preliminary objections

Article 90

Article 90 dealing with objections by the respondent to the jurisdiction of the Tribunal or to the admissibility of the application, closely follows the corresponding provision of the ICJ Rules (article 79).

No changes were proposed to paragraphs 1-3. With reference to paragraph 4, a more precise formulation was considered necessary to make it clear that the term "further proceedings" referred to preliminary proceedings. Paragraphs 5 and 6 drew no comment.

Concerning paragraph 7, a proposal was made to change the second sentence, which provides that the Tribunal shall fix time-limits for the further proceedings if it rejects the preliminary objection. The suggestion was to the effect that the Tribunal should fix time-limits for the beginning of the "substantive proceedings". However, other delegations did not favour the proposal arguing that the further proceedings in question could include a subject which was raised as a preliminary objection but was not regarded as having an exclusively preliminary character, and thus the further proceedings could not be confined to substantive proceedings.

With regard to paragraph 8, it was suggested to add that the Tribunal itself should also have the competence proprio motu to determine that a preliminary objection should be taken up when dealing with the merits of the case itself. This proposal was not favoured by other delegations who preferred to keep the wording of paragraph 8 unchanged.

Subsection 4. Counter-claims

Article 91

No comments were made on this article which corresponds to the provisions of article 80 of the ICJ Rules.

Subsection 5. Intervention

This subsection is based on articles 31 and 32 of the Statute of the Tribunal. The wording of the articles of this subsection closely follows the wording of articles 81-86 of the ICJ Rules.

Article 92

This article drew no comments.

Article 93

Some delegations suggested that the right to intervene in cases of interpretation or application provided for in article 32 of the Statute of the Tribunal should not only be enjoyed by States Parties to the Convention but possibly also by entities other than States, since article 32 of the Statute made reference to articles 21 and 22 which permitted access to entities other than States which are parties to any other agreement conferring jurisdiction on the Tribunal. There was therefore general agreement, following the discussions of the problems connected with access to the Tribunal by entities other than States, that the articles of Subsection 5 should, if necessary, be amended.

Article 94

This article provides to whom certified copies of an application for permission to intervene or of a declaration of intervention are to be communicated.

With reference to paragraph 2 the question was raised as to the need for copies of such applications or declarations of intervention to be transmitted to the Secretary-General of the International Sea-Bed Authority except those that relate to matters affecting the sea-bed. The question was also raised whether it was necessary in every case to transmit such copies to the Secretary-General of the United Nations.

It was proposed to reword subparagraph 2(d) by reference to other parties which "have to be notified" rather than those that "have been notified".

Articles 95, 96 and 97

No suggestions were made with regard to these articles which specify the procedure for dealing with applications and interventions provided for under articles 31 and 32 of the Statute of the Tribunal.

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Subsection 6. Special reference to the Tribunal

Article 98, paragraph 1

Several delegations felt that the provision could not be parallel to that of the International Court of Justice since there was no possibility of an appellate procedure under the Convention of the Law of the Sea in Part XV on the settlement of disputes. In accordance with article 287 the Tribunal, the Court and the other tribunals had equal status and there was no possibility of appeals from one to another. In the view of one delegation the situation was different in the practice of the International Court of Justice which was the highest tribunal of the United Nations which had general jurisdiction not restricted rationae materiae.

With respect to the Law of the Sea Tribunal it was pointed out that an appellate procedure was possible only in cases under the Convention where the parties have had recourse to some other procedure before another forum for the settlement of disputes and had agreed previously that upon the conclusion or discontinuance of those proceedings they would go before the Tribunal. This was possible for instance where under article 281 and consequently Article 286 of the Convention, no settlement had been reached as a result of recourse to peaceful means chosen by the parties for the settlement of a dispute and where their agreement did not exclude further procedures. Another possibility for referral to the Tribunal was where a commercial arbitral tribunal had limited jurisdiction such as under article 188, paragraph 2(a) and the matter had to be referred to the Tribunal for a final decision which included the interpretation of the Convention. A further possibility mentioned was in cases of appeals from decisions of arbitral tribunals contemplated under article 11 of Annex VII and also Annex VIII of the Convention where the parties had so agreed in advance. Disputes which had been before the United Nations Security Council could also be submitted to the Tribunal subject to exclusions under article 298, paragraph 1(c) of the Convention. The referral of a dispute was also possible under the terms of any agreement referred to in article 21 or 22 of Annex VI. Given these provisions there was general agreement that this paragraph would have to be reformulated to provide for the permissible cases to be submitted to the Tribunal but without making it a generally accessible appellate body to deal with decisions from the other forums contemplated under article 287 which had parallel jurisdiction under article 288 of the Convention.

Other comments made in this connection included the following:

- that the rule was not needed and should be deleted;
- that the reference in the article to a "dispute or an application" was not appropriate since disputes were submitted to the Tribunal by way of applications and the alternative was by way of an agreement;
- that the reference to the courts or tribunals contemplated in Parts XI and XV of the Convention should be deleted and that reference should be made to other international forums or an international body referred to under Parts XI and XV before which the earlier proceedings have been taken;
- that there should be specific mention of the applicable provisions of the Convention;

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- that there were differences of terminology in the French and English texts and furthermore the French text made no reference to the Law of the Sea Convention although the English text did.

As a consequence of these discussions the Secretariat was requested to provide a redraft of this article and accordingly a revised text was submitted to the Special Commission in document LOS/PCN/SCN.4/1985/CRP.12. This draft was examined at length but general acceptance was not possible on the redrafted article.

As regards the redraft of article 98 in LOS/PCN/SCN.4/1985/CRP.12, while some delegations were satisfied with its form and content, others sought further changes to more closely conform to the views expressed by them previously. Some delegations again sought the deletion of this draft Rule. The views expressed were indicative of the need to clarify the situations when special reference was permitted under the Convention; to ensure that it would not constitute an appellate procedure as between the forums for the settlement of disputes referred to in article 287 of the Convention when exercising jurisdiction under article 288 except when agreed to in advance under article 11 of Annex VII; and that disputes could be referred to the Tribunal under other agreements only when these were specifically provided for under such agreements and were related to the purposes of the Convention and permitted by it.

Subsection 7. Discontinuance

The two articles of this subsection which follow the pattern of articles 88 and 89 of the ICJ Rules provide for the procedure to be followed with regard to the discontinuance of the proceedings.

Article 99

One delegation considered it superfluous to provide in paragraph 1 that the Tribunal in ordering the discontinuance of the proceedings should have to direct that the case be removed from the list since that should be the normal consequence of discontinuance.

Article 100

One delegation suggested the deletion of the last sentence of paragraph 2 which provides that the proceedings shall continue if the respondent objects to the discontinuance of the proceedings sought by the applicant. Some delegations opposed the deletion, arguing that this would curtail the rights of the respondent since *inter alia* it was pointed out that the respondent may for instance already have presented a counter-claim which had to be considered. Moreover, if this sentence were deleted the respondent could possibly forfeit certain advantages ensuing from article 34 of the Statute of the Tribunal dealing with costs. They were therefore of the view that the sentence should be retained.

Section E. Proceedings before the chambers

The articles of this section closely follow articles 90-93 of the ICJ Rules.

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Article 101

This article provides that proceedings before the chambers shall, subject to the provisions of the Statute and of these Rules relating specifically to the chambers, be governed by the provisions of Parts I to III of these Rules.

One delegation proposed that in this article reference should also be made to the Law of the Sea Convention itself since the Convention also contained provisions relating to the chambers.

Article 102

This article stipulates that a case should be dealt with by a Standing Special Chamber or the chamber for summary procedures if the parties are in agreement thereon. Some delegations drew attention to the fact that article 25(2) of the Statute of the Tribunal provides in the case of special circumstances that the chamber of summary procedure shall have the power to prescribe provisional measures. Such provisional measures may be adopted at the request of any party to the dispute. It was proposed to bring the last sentence of paragraph 1 of article 102 into harmony with the provisions of article 25(2) of the Statute by making reference to the exception therein.

With regard to paragraph 2 one delegation suggested setting out the provision of article 17(4) of the Statute of the Tribunal in the Rules rather than merely making reference to it.

Article 103

No comments were made on these articles which deal with written and oral proceedings in a case before a chamber.

Article 104

There was agreement that this article which merely provides that judgments given by a chamber shall be read at a public sitting of that chamber should be deleted and that the relevant provision should be included in article 105 dealing with judgments.

Section F. Judgments, interpretation and revision

Subsection 1. Judgments

This subsection is based on articles 30 and 34 of the Statute of the Tribunal and follows the pattern of articles 94-97 of the ICJ Rules.

Article 105

Apart from the proposal to combine articles 104 and 105 it was suggested to supplement article 105(1) to the effect that the judgment shall be read within a reasonable period from the notification of the parties.

Article 106

It was proposed that all components of a judgment as listed in article 30 of the Statute of the Tribunal should also appear in article 106 of the Rules of the Tribunal.

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Article 107

While the proposal was made to delete this article and to incorporate this provision in article 61 of the Draft Rules, another delegation questioned its deletion. The article stipulates which language of the judgment shall be authoritative.

Article 108

It was suggested to either delete this article, which on the basis of article 34 of the Statute of the Tribunal deals with costs, or draw the link to and to bring it into harmony with the corresponding provision of article 106(1).

Other delegations felt that this article was necessary, arguing that it would also be applicable where a case was discontinued and, hence, in the absence of a decision of the Tribunal or a decision that specifies the quantum and modalities for payment of costs there may have to be an order in the matter of costs. Moreover, a decision in principle as to one party bearing the costs of the other party was different from the order giving effect to that decision as the Tribunal might also have to enquire into the expenses incurred by a party and require proof thereof to fix quantum and also the time and the manner in which the costs had to be paid.

Due to the divergence of views the Secretariat was requested to present a redraft of this article attempting to incorporate the views expressed.

With reference to the redrafted article 108 in LOS/PCN/SCN.4/CRP.13 one delegation reiterated the need for a clearer link between that article and article 106. Another delegation expressed the need to elaborate in article 108 that orders for costs may be needed to give effect to decisions on the question of costs in situations other than that contemplated in article 106. Proposals of a drafting nature were made to clarify these positions. A suggestion to revert to the original formulation in LOS/PCN/SCN.4/WP.2 with a slight modification to reflect that orders for costs shall be made whenever necessary to give effect to decisions under article 34 of the Statute seemed to attract widespread support, with few reservations.

Subsection 2. Requests for interpretation or revision of a decision

Some delegations proposed to replace the word 'decision' in the title of this subsection by 'judgment'. They argued that the term 'decision' was more widely conceived than the term 'judgment' in that it also covered the concept of orders and it must avoid the impression that all decisions were open to interpretation and revision. In response to a request, the Secretariat undertook to review the history and rationale for the use of these terms in the Convention and Statute and provide a response later. There appeared to be some difficulty in the French and Spanish texts of these articles also.

Article 109

This article dealing with interpretations of a decision is based on article 33(3) of the Statute of the Tribunal. It follows the language of article 98 of the ICJ Rules.

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It was proposed to replace the word 'decision' by 'judgment' also in article 109, and a request for interpretation was to be admissible only in respect of the final judgment. It was further suggested that article 109 should make reference to article 33(1) of the Statute of the Tribunal in order to make clear what kind of decision is referred to in article 109.

Another proposal concerned the suggestion to fix a time-limit in article 109 for the submission of a request for interpretation on the grounds that the defeated party in some cases might take advantage of the request for interpretation of a judgment to delay its enforcement. Other delegations opposed the fixing of such a time-limit.

It was also proposed to bring article 109(4) into full harmony with article 33 of the Statute and to delete the reference to the making of a request by an application or by notification of a special agreement.

Article 110

This article and the two following it, deal with revision of decisions.

In view of the fact that neither the Convention nor the Statute of the Tribunal makes provision for a revision of decisions of the Tribunal, attention initially focussed on the possibility of including provisions on revision in the Rules of the Tribunal.

The Secretary of the Commission explained that the drafting history of the provisions regarding judgments or decisions of the Tribunal which did not show any examination of the question as to whether the Tribunal should be enabled to review its decisions either on the basis of new information or any other grounds.

He drew attention in this connection to an explanatory memorandum on the first Single Negotiating Text in which the President of the United Nations Conference on the Law of the Sea stated (A/CONF.62/WP.9/Add.1) that the general procedures for the functioning of the Tribunal and its powers were on the lines of the Statute of the International Court of Justice and other international judicial tribunals. That memorandum continues to say that the intention had been to follow the practice of the International Court of Justice and other international tribunals. Thus the omission from the Statute of the Tribunal of any provision regarding revision of its decisions did not imply ipso facto that the possibility of revision was not to be contemplated.

Initially some delegations expressed doubts as to whether provisions on the revision of decisions should be included in the Rules, arguing that the Tribunal could not claim competences that were not conferred in the Convention or the Statute.

In the course of further discussions many delegations pointed out, however, that no provision of the Statute prohibited the possibility of revision of decisions. It was underlined that provisions on revision were necessary in order to avoid miscarriages of justice. It was further emphasized that any court had the inherent power to revise its own decisions if new facts of a decisive nature came to light which, at the time when the decision was given, were unknown both to the court and to the party claiming revision and if it was not due to that party's negligence. Provisions on the revision of decisions, these delegations explained, were found in every legal system, both domestic and international.

As a result of the discussion there was general agreement that while provisions on the revision of decisions should be included in the Draft Rules, the report containing recommendations for submission to the meeting of the States Parties regarding practical arrangements for the establishment of the International Tribunal of the Law of the Sea, which had to be prepared by the Preparatory Commission under paragraph 10 of Resolution I, was to draw attention to the fact that there is no provision in the Statute of the International Tribunal for the Law of the Sea concerning the revision of decisions or judgments and that the Preparatory Commission felt the necessity to include some provisions on revision in the Rules of the Tribunal. It would be for the meeting of States Parties to consider this recommendation. In the light of the discussions within the Preparatory Commission on this problem and the position taken by the meeting of States Parties, the Tribunal itself, could under article 16 of its Statute, then make the necessary decision.

It was proposed to review the use of the terms 'decision' and 'judgment' in articles 109-112. One delegation felt that 'decision' should be replaced by 'judgment' while others suggested that this should not be done in every case but only at certain points and that the language and usage of the Statute of the Tribunal should be followed.

Some delegations suggested merging articles 110 and 111 for the reason that both articles dealt with the same subject-matter and thus duplication could be avoided. Moreover, it was proposed to change the sequence of the various paragraphs of this article in such a way that the requirements for revision were to be dealt with first and the procedure for revision thereafter.

One delegation was of the view that paragraph 4 should provide for a shorter period, than the present six months, after the discovery of the new facts, within which the application for revision must be made at the latest. In that view, moreover, in paragraph 5, which stipulates that no application for revision may be made after the lapse of ten years from the date of the decision, the period should be shortened. Other delegations objected to changing the time-limits fixed in paragraphs 4 and 5.

Article 111

One delegation felt that in line 3 of paragraph 1 the reference should be to article 71 of the draft rules rather than to article 110.

Another delegation suggested to redraft this article so that it would provide that if the Tribunal found that its earlier decision had not been complied with, it should stop the proceedings on the question of revision immediately.

Another proposal envisaged the addition of a new paragraph to the effect that if the Tribunal found that an application was inadmissible and if the judgment had not been complied with the parties to the dispute should implement the judgment within the next three months. At the conclusion of these exchanges the Secretariat was requested to prepare a redraft of these articles (articles 110 and 111) and to incorporate therein the views expressed.

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Articles 110 and 111

Article 110 of LOS/PCN/SCN.4/1985/CRP.14, which was a redraft incorporating the original articles 110 and 111 was introduced by the Secretary who explained that it was only final decisions that could be reviewed. The article was discussed and found to be satisfactory although some delegations suggested that it should be broken up into two separate articles. One delegation expressed the view that paragraph 8 required further clarification. It was agreed that a footnote should be incorporated in the text of the draft rules to indicate that although the Statute of the Tribunal did not specifically provide for revision of decisions the Commission felt that it was necesary to make provision in the rules for the reasons explained above. One delegation expressed reservations on the paragraph as a whole.

Article 112

This article provides that where the original submission has been heard either by a Tribunal or a Chamber the request for interpretation or revision must be heard by that same Tribunal or Chamber. The language of the draft followed closely the rules of the ICJ (article 99). However, the Secretary explained that the ad hoc chambers of the Tribunal were constituted by the parties unlike in the case of the ICJ. He also explained that in view of the fact that a comparatively long space of time may elapse between the rendering of the decision and the application for revision or interpretation and that therefore the same judges may no longer be available, it was appropriate to make paragraph 1 more flexible in that it should provide that if the decision was given by a chamber, the request for its revision or interpretation should be dealt with by that same chamber or by a chamber constituted in a manner similar to the original chamber.

Several delegations concurred with this requirement and some delegations felt that in cases where the composition of the chamber requires the approval of the parties and where that approval cannot be obtained within the time-limit fixed by the Tribunal, the request should be dealt with by a chamber constituted in a similar manner by the Tribunal or by the Tribunal itself.

As a result of the discussion the Secretariat submitted a redraft of article 112 in LOS/PCM/SCN.4/1985/CRP.14. Except for some minor drafting suggestions and a suggestion to divide the first paragraph into two pragraphs, the redraft was found to be acceptable. However, one delegation had reservations on the use of the term 'decision' in the text.

Section G. Modifications proposed by the parties

This article, which follows the language of article 101 of the ICJ Rules, permits the parties to propose modifications to that part of the Rules that governs proceedings in disputes.

One delegation was of the oipinion that the Tribunal should not be given a discretion as to whether to apply modifications agreed upon by the parties and that therefore the word 'may' should be replaced by'shall'.

Objecting to this proposal other delegations felt that on this question the Tribunal should follow the practice of the International Court of Justice. It should have the necessary flexibility in deciding on modifications to the proceedings proposed by the parties.

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Several suggestions of a drafting nature were made during the course of the article by article review of the draft rules and the supplement thereto. Some of these suggestions were intended to clarify the text while others were intended to harmonize the text in the different languages without affecting the substance of the articles. In this summary of the discussions it is not possible to reflect each and every such proposal. However they have been handed over to the Secretariat which continues to maintain a complete record of all such suggestions. They will be taken into account in the revision of the text. The Chairman would appreciate being apprised of any matter of consequence which has not been reflected in these summaries.

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CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Addendum

Prompt Release of Vessels and Crews - document LOS/PCN/SCN.4/WP.2/Add.1

Article 88A

It was decided that the article should be considered paragraph by paragraph. It was also agreed that since there was an interrelationship between paragraphs 1 and 5 that they be taken together.

Paragraphs 1 and 5

A proposal was made by some delegations to clarify the text and to ensure that the application could be made unilaterally as the flag State can take the action envisaged unilaterally. Other delegations however opposed the proposal stating that there is a procedure clearly laid down in article 292 of the Convention and it was not necessary therefore to refer to a unilateral application. It was pointed out by the Secretary that paragraph 5 makes it clear that an application can be made unilaterally when the conditions are fulfilled.

One delegation proposed the inclusion, in this article and in article 46, para. 4, of language to the effect that a State Party may notify the Tribunal by an official communication as to who is authorized to represent it or act on its behalf. It was pointed out however that a very similar proposal had already been made when discussing article 46, paragraph 4 of the rules.

In introducing paragraph 5 the Secretary stated that the paragraph covered three possibilities, (a) where the 10-day period has lapsed the flag can apply unilaterally, (b) the 10-day period could be waived where there is an agreement between the parties to take the case to the Tribunal, (c) the

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residual situation where the parties have otherwise agreed on the Tribunal's jurisdiction and the case can be taken by the Tribunal after the lapse of the 10-day period. He also pointed out that in paragraphs 1 and 5 as drafted, that paragraph 1 covered the possibility where a unilateral action can be taken by the flag state after the 10-day period had lapsed and where the other conditions had been fulfilled. Paragraph 5 covered the exceptions. Some delegations however viewed paragraph 1 as covering all the three possibilities laid down in article 292, paragraph 1 of the Convention and therefore proposed that paragraph 5 be deleted. Some other delegations were, however, against the deletion of this paragraph. It was therefore decided that the Secretariat should redraft paragraphs 1 and 5 in the light of the discussions that took place.

Paragraph 2

There were no comments made on this paragraph.

Paragraph 3

It was proposed by one delegation that only in appropriate cases should authorization need to be authenticated since in article 40, paragraph 3, if an application is signed either by the agent of the Party submitting it, or by the diplomatic representative of that Party in the country in which the Tribunal has its seat or by some other duly authorized person, then the signature need not be authenticated. It is only if the application bears the signature of someone other than such diplomatic representative, then the signature would have to be authenticated.

Paragraph 4

It was suggested that the particulars of the owner and operator should both be provided and that the reference to the alternative in line 7 should be changed accordingly. Another proposal was that rather than providing particulars as to tonnage and other data relevant to the determination of value (fifth and sixth lines) reference should be made to cargo capacity and other data which will be taken into account when determining the limit of liability of the shipowner. It was further suggested that in the third sentence of this paragraph that there should be reference to the terms of the bond or other financial security that has been required and the extent to which such requirements have been complied with. The same delegation also proposed adding a new paragraph to article 88A which should state that the exhaustion of local remedies should not be required by the Tribunal under article 295 of the Convention. No discussions took place on these proposals.

Article 88B

Paragraph 1

It was proposed that a new paragraph be inserted between paragraphs 1 and 2 which should provide that the Tribunal should, after the 10-day time limit provided for in article 292 of the Convention, as a general rule hear the application in the Chamber constituted in accordance with article 15 of the Statute, if the parties do not agree on another procedure.

With reference to paragraph 1, it was also suggested that the priority given to applications for prompt release of vessels should not extend over all other cases since it was contended that it may be touching upon the discretionary powers of the Tribunal. Some delegations however were against this change since in their opinion the prompt release of vessels should be treated with priority as provided in the Convention itself. Certain delegations felt that the priority should be absolute and be a higher priority than applications for provisional measures. There was also a suggestion that the priority should be described as being of a high level. Others were of the opinion that paragraph 1 should be drafted in such a way that the Tribunal be left with the discretion of determining the priority after having all the facts.

Paragraph 2

It was suggested that a time-limit be added in this paragraph. There was no other comment made.

Paragraph 3

The view was expressed that this paragraph should only state that the bond should be reasonable and appropriate and that it was for the Tribunal to determine the amount of the bond or other financial security. Another view was that it should not in any case exceed the value of the vessel. Other delegations did not agree with this suggestion and wanted the paragraph to remain unchanged. It was also proposed that since this paragraph dealt with substantive matters it should be moved to article 88C.

Paragraph 4

It was suggested that the paragraph goes beyond what is envisaged in article 292 of the Convention which is the constitutional basis for the paragraph. It was proposed that in respect of an agreement between the parties a case could be presented to the Chamber of Summary Procedure. It was further suggested that the paragraph should be amended to provide that, even under summary procedure, the parties should be heard before a determination is made.

In replying to a question as to why the paragraph was drafted allowing the Chamber of summary procedure to deal with the case of the prompt release of vessels if the Tribunal is not in session, the Secretariat replied that the paragraph was drafted in such a way as to bring out the spirit of the Convention. Article 15, paragraph 2 of the Statute states that "The Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request", therefore the Secretariat felt this could apply to the issue of the prompt release of vessels. The application for release, however, is without prejudice to the merits of the case.

The view was also expressed that this provision may not be in accordance with the requirements of article 292 of the Convention since under that article the full Tribunal should sit to deal with such an application. One delegation proposed, in response, that the meeting of States Parties convened under article 4, paragraph 4 of the Statute should consider accepting a collateral agreement to the effect that the States Parties agree that

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applications for the prompt release of vessels and crews are to be made to the Chamber of Summary Procedure. This suggestion was opposed by some delegations. There was support for maintaining the paragraph since it was in keeping with the spirit of article 292. Some delegations felt that in agreeing to the Chamber of Summary Procedure to deal with this case, decisions emanating therefrom should be subject to review by the Tribunal.

The suggestion was, that in this paragraph, not only should the determination be referred to but also the hearings which precede the determination. Another proposal was that the content of this paragraph should be located immediately after the first paragraph.

Article 88C

Paragraph 1

A proposal was made that paragraph 1 should be redrafted taking into consideration commercial ships which are State-owned, in which case a State guarantee should be adequate security. It was also suggested that the amended paragraph should include reference to the State or State organ, the juridical or physical person to which such security is to be tendered, and further, that the order should also call upon the detaining State to promptly release the vessel and its crew upon the posting of the security specified by the Tribunal or Chamber. Some delegations however proposed that the text as drafted be maintained.

Paragraphs 2 and 3

In discussing these two paragraphs delegations were of the view that they are repetitious and therefore not necessary. It was however decided that articles 88B and 88C be redrafted and rearranged taking into consideration article 292 of the Convention and showing clearly the two stages involved,i.e.

1) the determination on the nature of the bond or other financial security and

2) the order to the detaining state to release the vessel and its crew.

The term "determined" at the end of paragraph 1 and the term "decision" in the second paragraph needed to be rationalized in the view of one delegation.

Article 88D

In discussing this article it was explained that in drafting it the Secretariat took into consideration two possible situations: 1) Although the bond ordered by the Tribunal may have been posted, yet the vessel may have not been released. Therefore, the final stage will only come when the Tribunal is informed that the order has been complied with. It could then endorse the security to the detaining State; 2) The detaining State may decide of its own accord and release the vessel. It was only when either of these alternatives had transpired that the proceedings would end. Any further proceedings would have to be separate. Some delegations were of the view that this article should be redrafted so that if the detaining state releases the vessel and crew it should immediately inform the Tribunal.

Article 88E

In discussing this article some delegations were of the opinion that the bond should be posted only with the detaining state while others felt that the bound should be posted with the Tribunal. The question arose as to when the

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Registrar can transfer the bond or transmit the security to the detaining State if it is posted with the Tribunal. One delegation however was of the opinion that because of the financial transactions involved and since the Tribunal may not have the capacity, the article should be deleted in order to avoid any future problems. Others were of the view that no substantial functions were involved in receiving and accepting bonds and security. Several suggestions of a drafting nature were made in this context. It was pointed out by one delegation that the Registrar would need to be informed as to the final judgement of the domestic forum to be able to determine the quantum of the judgement or award before he can act under paragraph 1 in transmitting the bond or security to the detaining State. Another suggestion was that reference in the first paragraph to transmitting the bond should be changed to indicate that what was required of the Registrar was to endorse the bond or security to the detaining State. In the second paragraph the reference to resease of the bond to the flag State to the extent that it was excessive to satisfy the judgement or decision of the national forum, was not appropriate but that what was required was to reduce the quantum of the bond or security as necessary for the purpose. Another suggestion was that under the second paragraph, it should be possible to release the bond or security not only to the flag State but also to its authorized representative.

The reasons given by delegations that suggested the bond or other financial security be posted with the detaining State were: that article 292, paragraph 1 implied this; that it would be easier to secure the attendance of captain and crew to testify before the national court when the case is being deliberated; that it would ensure that the vessel could be made available as an exhibit in the case before the national court: and that in private international law the procedure is that the bond or other financial security is normally set aside in a financial institution in the name of the flag State with the condition that whatever the amount of the judgement will be paid to the detaining State. In that view, therefore, the Tribunal needs only to know that the bond or other financial security is already posted with the detaining State. Other delegations considered it necessary that the bond or other financial security should be posted with the Tribunal since the question in dispute may be the matter of the bond or security and that depositing it with the Tribunal was necessary for the Tribunal to expedite the decision on the release of the vessel and its crew and to enforce its decision. Many delegations considered the substance of the article as being necessary.

There were other proposals of a drafting nature. The Secretariat was requested to redraft the article, taking into consideration the changes proposed.

The location of draft articles 88A to 88D on prompt release of vessels and crews, in document LOS/PCN/SCN.4/WP.2, was discussed. It was decided that the articles be inserted under Part III, Section D - Incidental Proceedings. These articles will be headed "Subsection 2. - Prompt release of vessels and crews." The subsequent subsections will then be renumbered accordingly.

Since this is a summary of the deliberations it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. However, the Secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. The Chairman would be grateful if his attention is drawn to any important omissions.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Fourth session
Kingston, Jamaica
17 March-11 April 1986

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The Special Commission decided, in accordance with the recommendations of its bureau, to continue its article by article examination of the Draft Rules of the Tribunal (LOS/PCN/SCN.4/WP.2), commencing with draft article 114 and proceeding in accordance with its earlier decision as recorded in document LOS/PCN/SCN.4/L.2, paragraph 1.

Part IV. The Sea-bed Disputes Chamber

Section A. Judges and experts of the Chamber

Subsection 1. The Members of the Chamber

Article 114

This article is in part inspired by Article 1 of the ICJ Rules and relates to the selection of Members of the Sea-bed Disputes Chamber.

With regard to the title to this Section and paragraph 1, as agreed earlier, the term "Members" which is used in the Convention would replace "judges". In accordance with the earlier decision (recorded in LOS/PCN/SCN.4/L.2) it was decided to replace the terms "judge" and "judge ad-hoc" by the terms "Member" and "Member ad-hoc", respectively.

Concerning paragraph 2, which deals with the criteria applicable to the selection of the Members of the Chamber, some delegations were in favour of deleting the requirement to take account of any special knowledge, expertise or previous experience as an added qualification that Members of the Tribunal may have. They argued that the Convention did not stipulate such a criterion and that Article 35(2) of the Statute provided that in the selection of the members of the Chamber, the representation of the principal legal systems of the world and equitable geographical distribution should be assured. Moreover, the paragraph mandates it to the Assembly of the Authority to adopt recommendations of a general nature relating to representation and distribution. These delegations felt that the Rules should not be

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contain criteria additional to those established in the Statute because the members of the Sea-bed Disputes Chamber were to be selected from among the members of the Tribunal who already had to meet the criteria laid down in Article 2(1) of the Statute, which is that they should enjoy the highest reputation for fairness and integrity and be of recognized competence in the field of the law of the sea.

Others stressed however that it was not possible for all the members of the Tribunal to have equal qualifications. They were of the view that in the light of the specific tasks facing the members of the Sea-bed Disputes Chamber, they should have specialized knowledge, expertise or experience in the areas falling within the mandate of the Chamber. Such specialization, they felt, could enhance the Chamber's efficiency.

As a result of the views expressed in the discussion it was decided to delete the added requirement in the last phrase of paragraph 2 and to explain in the Chairman's Summary that this deletion was motivated by the same considerations that prompted the Conference on the Law of the Sea to delete a corresponding formulation from the Informal Single Negotiating Text, Part IV (A/CONF.62/WP.9/Rev.1). This deletion was not to be interpreted to mean that in the selection of the members of the Chamber special knowledge and previous experience in the matters falling within its competence were not to be taken into account.

No suggestions were made concerning paragraph 3.

It was proposed that paragraph 4 be redrafted to conform with the redrafting of article 1, paragraph 3, of these Rules.

The following redrafts of articles 1(3) and 114(4) were approved:

Article 1, paragraph 3

In the following Rules, the term "ad hoc Member of the Tribunal" denotes any person chosen under Article 17 of the Statute for the purposes of a particular case.

Article 114, paragraph 4

In these Rules, the term "ad hoc Member of the Chamber" denotes any person chosen under Article 17 of the Statute for the purposes of a particular case before the Chamber.

It was agreed that other provisions in the present Draft Rules that make reference to these definitions would have to be changed accordingly.

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Article 115

This article defines the term of office of Members of the Chamber.

During the discussion of paragraph 1 one delegation felt that this provision should be read in conjunction with articles 35(5) and 5(3) of the Statute according to which "the members of the Tribunal shall continue to discharge their duties until their places have been filled".

To make it quite clear at what point in time the term of office of a Member of the Chamber replacing a Member whose term of office has not expired shall begin to run, one delegation suggested the addition of reference to the predecessor's term at the end of this paragraph.

Article 116

This article was taken from Article 3 of the ICJ Rules and deals with the question of seniority.

One delegation suggested the deletion of paragraph 1 since Article 15 contained a general provision by which the rule in the Tribunal applied also to the Chamber to this effect. However, it was pointed out that Article 15 only covers the procedural aspects of proceedings before the Tribunal which apply mutatis mutandis in proceedings before the Sea-bed Disputes Chamber. It is Article 116(1) which regulates the question of precedence.

No suggestions were made concerning paragraphs 2 and 3.

With regard to paragraph 4 one delegation considered the words "and able to act" in the last sentence superfluous and wanted them deleted. Another delegation favoured redrafting paragraph 4 to bring it into conformity with Article 3(6) of the ICJ Rules.

Article 117

This article is a modification of Article 4 of the Rules of the Court, and includes a special declaration to be made by the members of the Chamber. It emphasizes their obligation to preserve the secrecy of any confidential information coming to their knowledge by reason of their membership in the Chamber.

In view of the fact that under Article 4 of the Draft Rules all members of the Tribunal are already required to make a solemn declaration, some delegations felt that Article 117 should be deleted. They felt that members of the Tribunal should not have to make a declaration different to that made by judges of the ICJ, since the two forums had parallel jurisdiction. They argued that a declaration as to the honourable, faithful, impartial and conscientious performance of duties under Article 4 implies the obligation to preserve secrecy. Under the

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Statute of the Tribunal only one solemn declaration was required. Additional declarations were only apt to diminish the validity of the declaration called for by Article 4 and would, moreover, create a difference in status and character among the members of the Tribunal.

Other delegations wanted to keep Article 117 on the grounds that in accordance with Article 163(8) and Article 168(2) of the Convention on the Law of the Sea and with paragraph 3 of Resolution II governing preparatory investments in pioneer activities relating to polymetallic nodules, the secrecy of specific information in connection with the exploration and exploitation of the resources of the international Area must be preserved. This obligation of secrecy, they argued, must also apply to the members of the Tribunal since information of proprietary data could come to their knowledge when exercising functions as members.

It was agreed as a result of the discussion to delete Article 117 and to supplement Article 4 in such a way that it is clear that the members of the Tribunal have the obligation to maintain and preserve the secrecy of any confidential information coming to their knowledge as a consequence of their membership of the Tribunal even after the expiry of their term of office. The Special Commission agreed to the redrafted version of Article 4 submitted by the Secretariat in LOS/PCN/SCN.4/1986/CRP.15.

Subsection 2. Judges ad hoc

Article 118

This article deals with the nomination of *ad hoc* Members of the Chamber and the solemn declaration to be made by them.

In paragraph 1 it was suggested that the reference to the paragraphs of article 8 should be deleted so that the entire article would apply to the Chamber.

In paragraph 2 it was agreed that the reference to Article 117 be deleted since it had been decided to delete that entire article.

Subsection 3. Experts

Article 119

This article, which deals with the appointment of experts by the Sea-bed Disputes Chamber, was formulated along the lines of Article 9 of the ICJ Rules.

Some delegations were of the view that paragraph 1 should contain a direct reference to Article 289 of the Convention to point out the legal source from which the powers to appoint experts were derived.

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In response to the various suggestions made, Article 119 was redrafted to read as follows:

> "The powers with respect to the appointment of experts in accordance with Article 289 of the Convention shall belong to the Chamber and its ad hoc Chambers and to the presidents thereof, in accordance with Article 9 of these Rules".

The proposal to delete Article 9(4) of the Draft Rules on the grounds that it contained essentially the same provisions as Article 119(1) was contradicted by other delegations who felt that Article 9(4) was of a general nature and was also applicable to the Special Chambers formed in accordance with Article 15 of the Statute of the Tribunal.

In view of the tenor of the discussion on Article 117 some delegations were of the opinion that the experts, too, should make only one declaration and that, therefore, paragraph 2 should be deleted and Article 9(5) amended in the same way as Article 4(1).

The Special Commission approved the redraft of Article 9(5) as contained in document LOS/PCN/SCN.4/1968/CRP.15. As a consequence Article 119(2) would be deleted.

The Special Commission endorsed the proposal to amend articles 25 and 26 of the Draft Rules, dealing with the declarations to be made by the Registrar and the staff of the Registry, along the lines of the redrafts of Article 4(1) and Article 9(5).

Section B. The presidency of the Sea-bed Disputes Chamber

Article 120

A number of suggestions were put forward to make the text of this article more concise. One proposal was to delete the explanatory references to the content of the articles that would be applied. Another suggestion was to use "mutatis mutandis" which was used elsewhere in the Rules. It was also proposed to use the term "presidency" in place of "president" since Article 120 refers to the institution of the presidency rather than to the person of the president. This argument, it was suggested, was not invalidated by the fact that the Sea-bed Disputes Chamber would have no vice-president. Others thought this would be too wide and greater specificity was required.

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Section C. Proceedings before the Sea-bed Disputes Chamber

Article 121

There are no comparable provisions in the ICJ Rules for this article which deals with proceedings before the Sea-bed Disputes Chamber. The Rules of the Court of Justice of the European Economic Community have served as a model with respect to these aspects of the access of entities other than States to the Sea-bed Disputes Chamber.

Concerning paragraph 1 no suggestions were made.

With regard to paragraph 2 it was suggested to express in clearer terms that this paragraph not only covers proceedings in which one party is an entity other than a State Party but also proceedings where all parties are such entities. Corresponding drafting proposals were made.

As for paragraph 3 it was proposed that the substance of Article 20(2) of the Statute should be included.

With reference to the subparagraphs of paragraph 3 the following proposals were made: One delegation suggested that in subparagraph (a) account should be taken of the fact that not all Parties have a permanent residence, and that a registered office address could also be suitable. It was further suggested that in subparagraph (b) the reference to the respondent was superfluous while in another view the only reference needed was to the name of the respondent. For subparagraph (c) it was proposed that there be reference to an indication of the sponsoring State and the different entities that could be substituted for, such as a State enterprise and a natural or juridical person. The same delegation felt that subparagraph (d) should be worded on the lines of article 40(2).

No suggestions were made concerning paragraph 4.

As for paragraph 5 several delegations questioned the need for it. A number of delegations did not consider it appropriate to stipulate that a lawyer acting for a party must lodge at the Registry a certificate that he is entitled to practise before a Court of a State Party. Rather, they felt, the parties to a dispute before the Sea-bed Disputes Chamber should be free to also entrust other persons with the representation of their interests before the Chamber. Eventually it was agreed that paragraph 5 should be redrafted in line with the provisions of Article 46(2) of the Draft Rules.

With respect to paragraph 6 some delegations felt that a reference to the concept of private law was not appropriate since some legal systems did not have such a concept. The term "juridical person" was clearly defined in the Convention and did not require any further explanation.

Pointing to the differentiation the Convention makes between a juridical person and a State enterprise, one delegation held the view that the Rules should reflect this accordingly.

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One delegation proposed to delete subparagraph (b) of paragraph 6.

With regard to paragraph 7, which is based on Article 38(7) of the EEC Rules, some delegations felt that it was not sufficiently clear and would need to be revised. To this end the following suggestions were made: Some delegations were in favour of deleting the final phrase in the first sentence since it was not necessary to explain the means by which the application could be put in order. The question of required form and its implications under the different legal systems led to the approval of the suggestion that the end of the sentence be replaced with these words: "... the Chamber may decide to declare the application inadmissible in its present form." Yet, the delegation favoured keeping the paragraph as presently worded.

Concerning paragraph 8 attention was drawn to the necessity of redrafting the second sentence in the light of the suggestions made with regard to paragraph 7.

One delegation was of the view that the paragraph should explicitly state who decides on whether or not an application has been put in order, while others were in favour of retaining the current wording of the second sentence, since as the Secretary explained it was the practice for the Registrar to do so unless he needed to consult with the President for the purpose.

With respect to paragraph 9, which stipulates the time within which the respondent shall lodge a defence, the Commission agreed that this period should be extended to two months since in view of practical considerations and the technical issues involved, one month would be too short.

No comments were made on paragraph 10.

Article 122

This article was drawn up on the basis of articles 41, 42 and 43 of the Rules of Court of the EEC. It deals with the additional pleadings that may be lodged with the Chamber in the course of proceedings. It was agreed that the last word in paragraph 4 should be "proceedings".

One delegation expressed the view that paragraph 1 should take into account the wording of Article 55, paragraph 2, of these Rules.

No suggestions were made concerning paragraphs 2 to 7.

In connection with the examination of articles 121 and 122, dealing with proceedings where one or more of the Parties is an entity other than a State Party, some delegations thought it necessary to also take account, in this context, of Article 190 of the Convention, which regulates the participation and appearance of sponsoring States Parties in such proceedings. One delegation suggested that there should be a clear and direct reference to oral proceedings to avoid doubt, since they were only referred to indirectly in paragraph 7.

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Article 123

No suggestions were made regarding this article which sets out the procedure to be followed when the Chamber considers and decides on the suspension of the exercise of rights and privileges of a State Party deriving from its membership in the Authority.

Section D. Ad hoc chambers of the Sea-bed Disputes Chamber

Article 124

This article regulates the forming of ad hoc chambers of the Sea-bed Disputes Chamber in accordance with Article 36 of the Statute of the Tribunal and the appointment of members of these chambers.

No comments were made on paragraph 1.

With regard to paragraph 2 one delegation wanted to see the reference to the necessary appointment rather than the present form which seemed to imply that all appointments would be made by the President. Other delegations opposed this suggestion. They preferred to keep the current wording.

Section E. Notification for enforcement

Article 125

This article relates to the enforcement of any decision of the Sea-bed Disputes Chamber or its ad hoc chambers against natural or juridical persons.

It was suggested by several delegations to bring this article into line with Article 39 of the Statute. It was agreed that the term "State" be replaced by "State Party".

Some delegations proposed concordance with the Statute of the Tribunal as regards the use of the terms "judgement" and "order".

Part V. Advisory proceedings

The Special Commission already conducted a preliminary exchange of views on the question of advisory proceedings during the second session of the Preparatory Commission. A summary of that discussion is contained in document LOS/PCN/SCN.4/L.1.

Articles 191, 162, paragraph 2(u), 185, 159, paragraph 10, of the Convention and Article 40 of the Statute of the Tribunal form the basis of Part V of the present Draft Rules.

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Article 126

This draft closely follows Article 102 of the ICJ rules and lays down the procedure to be applied by the Chamber in the exercise of its advisory functions.

No comments were made on paragraph 1.

With regard to paragraph 2 the Special Commission accepted the proposal to divide the first sentence into two, with the first covering the application of Article 40 of the Statute and the second covering the application of the Rules concerning disputes. This makes it clear that the Sea-bed Disputes Chamber must apply the provisions of the Statute rather than being merely guided by them.

Concerning paragraph 3 it was suggested that rather than merely refer to Article 17 of the Statute, the fact that provisions deal with the nationality of members should be referred to.

It was suggested further to include an additional article in the Draft Rules which would reflect the agreement reached within the Special Commission during its preliminary examination of the question of advisory opinions to the effect that the Assembly or the Council shall not request an advisory opinion on matters which are already under consideration in a contentious case between the Authority and another Party. The Special Commission accepted this suggestion.

Article 127

This draft article sets out the procedure according to which the advisory opinion of the Chamber is requested and how it is to be requested.

In respect of paragraph 1 it was proposed to bring it into line with Article 191 of the Convention. It was to be formulated in such a way that it would not give rise to the impression as if the Secretary-General of the Authority had the competence to request for advisory opinions. It would have to come out clearly that the Secretary-General merely had to transmit a relevant request of the Assembly or the Council.

One delegation proposed to reword paragraph 1 along the lines of Article 65(4) of the ICJ Statute, to have paragraph 2 follow paragraphs 1 and 2 of Article 104 of the ICJ Rules and to deal with the transmittal of the document in paragraph 3 of that article.

As regards paragraph 2 one delegation wanted it deleted as being unnecessary while others favoured keeping it as it stands.

A proposal was made to include a paragraph on the formulation of the question to be put to the Chamber.

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Article 128

This draft article, which follows Article 103 of the ICJ Rules, stipulates that an advisory opinion should be given by the Sea-bed Disputes Chamber as a matter of urgency.

One delegation proposed to reword the article deleting the reference to article 159 of the Convention and suggesting that all advisory opinions should be proceeded with in accordance with Article 191 of the Convention at the earliest possible time, rather than that the Chamber should take steps to accelerate the procedure. Another delegation wanted the word "hearing" deleted.

According to a further proposal it was only necessary to provide that an advisory opinion should be given by the SBDC as a matter of urgency in accordance with Article 191 of the Convention. This was opposed by other delegations on the grounds that reference to Article 159(10) of the Convention constituted the legal basis for dealing with advisory opinions as a matter of urgency and therefore needed to be retained.

A suggestion to place Article 128 at the beginning of Part V was countered by others who argued that the articles of Part V are so placed because they follow a sequence of events.

Article 129

This draft article, which is inspired by Article 66 of the ICJ Statute, deals with the question of who is entitled to submit written or oral statements to the SBDC in connection with the consideration of advisory opinions.

There was a detailed discussion on paragraph 1, which stipulates that if there is a request for an advisory opinion any State Party may express a desire to submit written or oral statements and the SBDC will decide.

The discussion centred on whether or not Article 32 of the Statute of the Tribunal is applicable to advisory opinions and, hence, whether or not any State Party has a right to submit written or oral statements with the SBDC deciding merely on the form in which such statements are to be submitted and within what time-limit, or if it was at the discretion of the SBDC to permit only those States which in the Chamber's view are in a position to furnish information on the question, to submit written or oral statements. The latter position is in line with Article 66 of the Statute of the International Court of Justice.

Moreover, a large number of suggestions were made to make the wording of paragraph 1 more precise. These included the following:

- to bring the paragraph into line with Article 32(1) of the Statute of the Tribunal;

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- to reformulate it so that it would meet the requirement laid down in articles 159(10) and 191 of the Convention, i.e. that advisory opinions shall be given as a matter of urgency;
- to change the concept of expressing a desire to a straightforward request;
- to make it obligatory on the Chamber to accept a written statement or a request to be heard;
- to clarify that the written statement or opportunity for oral hearing be confined to matters relating to the question before the Chamber;
- to elaborate that the Chamber could only decide on the formal limitations concerning the written statement or oral hearing;
- to have the Secretary-General of the International Sea-Bed Authority send out notices rather than the Registrar;
- to redraft the paragraph in line with the wording of Article 66 of the ICJ Statute.

As the discussion developed the suggestion mentioned earlier, namely, that the Chamber's discretion should be limited to the form of the statement or hearing, appeared to attract the widest support. The delegations that required conformity with the ICJ Statute maintained their reservations.

The Secretariat submitted a redraft of that paragraph. It is contained in LOS/PCN/SCN.4/1986/CRP.16. According to that redraft any State Party has a right to submit written or oral statements. However, the SBDC decides on the manner of presentation and establishes a time-limit for such presentation to ensure that the proceedings could be carried out expeditiously and would not be subject to undue delay.

With regard to this redraft it was suggested to delete reference to the manner of making the presentation. This was based on the argument that it was to be left to a State Party itself whether it made its statement orally or in writing. Subject to this change the redraft contained in CRP.16 met with widespread approval.

However, some delegations maintained their reservations on Article 129(1) as redrafted and proposed to keep the provision in line with Article 66 of the ICJ Statute which only permitted those States who were called upon as being likely to be able to furnish information on the question to have the right to submit written statements or to provide oral statements relating to the question.

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They were of the view that Article 32(1) of the Statute of the Tribunal was not applicable to advisory opinions. They argued that if any State Party would be permitted to submit written or oral statements in the case of requests for an advisory opinion, there was a danger that the urgency required for dealing with advisory opinions under articles 159(10) and 191 of the Convention could not be assured.

Concerning paragraph 2 it was proposed to make it clear that international organizations as referred to in Article 305(1) and Annex IX of the Convention are not covered by this provision because they are included in the term "States Parties" as defined in the Convention.

With regard to paragraph 3 the suggestion was made to bring it into conformity with the redrafted paragraph 1 by deleting the words "... in the form, to the extent and ...". It was also proposed to insert the word "exclusively" after "comment" to assure that advisory opinions could be given as a matter of urgency.

Both proposals were accepted by the Special Commission.

The proposal to grant the right to comment on the statements made by other States Parties or organizations not only to those States Parties and organizations which submitted written or oral statements but to all States Parties and organizations mentioned in paragraph 2.was opposed by others who felt that if this right were thus enlarged the urgency of the proceedings could no longer be assured.

Another proposal was to delete the words "or both" as being superfluous.

Article 130

In respect of this article, which follows the provisions of Article 105 of the ICJ Rules, it was suggested to replace in paragraph 1 the word "or" by "and".

No comments were made on paragraph 2.

Article 131

Concerning this article, which is similar to Article 106 of the ICJ Rules, some delegations wanted the word "actually" deleted.

Article 132

This article is inspired by Article 107 of the ICJ Rules.

No comments were made on paragraph 1.

In respect of paragraph 2, which lays down in detail what advisory opinions should contain, it was suggested to adapt it more closely to Article 106(1) of the Draft Rules applicable to judgements and to amend Article 132(2) to the

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effect that it should also mention the question for which an advisory opinion is required from the SBDC. Other delegations felt that this was already covered by the summary of the proceedings and that Article 132(2) of the Draft Rules should not be unnecessarily dissimilar to Article 107(2) of the ICJ Rules applicable to advisory opinions.

Concerning paragraph 3, which stipulates that a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration, one delegation questioned the need for a member of the Chamber to record his concurrence with the majority of the members. Other delegations felt, however, that the Rules of the Tribunal should not, on this question, deviate from Article 107(3) of the ICJ Rules. It was noted that different reproductions of the ICJ Rules had different renditions of the article. One version used the form "concurrence on dissent".

Article 133

The article lays down whom the Registrar shall inform as to the date fixed for the reading of the advisory opinion. It was decided, in accordance with the Special Commission's decision with regard to Article 79(4) of the Draft Rules on the definition of the term "international organization", to delete the word "public" in the last line. (Cf. the definition contained in document LOS/PCN/SCN.4/1985/CRP.7).

This definition of the term "international organization" would apply to all relevant provisions of the Draft Rules and will be included in an article that regulates the use of terms.

Another proposal adopted was to add in the fourth line the word "and" so that it would read "United Nations and its specialized agencies".

Article 134

This article specifies who is to receive copies of the advisory opinion. Since under this article a copy is to be sent apart from the United Nations Organization also, where appropriate, to the Secretary-General of the United Nations, one delegation suggested to avoid this duplication.

Several suggestions of a drafting nature were made during the course of the article by article review of the draft rules. Some of these suggestions were intended to clarify the text while others were intended to harmonize it in the different languages without affecting the substance of the articles. In this summary of the discussions it is not possible to reflect each and every such proposal. However, they have been handed over to the Secretariat which continues to maintain a complete record of all such suggestions. They will be taken into account in the revision of the text. The Chairman would appreciate being apprised of any matter of consequence which has not been reflected in these

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summaries. These summaries do not include several explanations provided by the Secretary when introducing the articles or in the course of discussions, to clarify the implications of, and practice concerning, the procedure set out in the draft articles. In so far as these explanations were of assistance to clarify the issues under discussion, they should be taken into account when revising the texts.

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Special Commission 4
Fourth session
Kingston, Jamaica
17 March-11 April 1986

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Addendum

1. After completing the article-by-article examination of the draft rules of the Tribunal as contained in document LOS/PCN/SCN.4/WP.2 and Add.1 the Special Commission discussed the preamble and articles 15, 64 (2), 84 (1) and 88 B of the draft rules, on which it had deferred discussion. It also discussed other outstanding matters that were brought to its attention by the Secretariat.

Preamble

2. There had been a brief exchange of views on the preamble, at the beginning of the examination of the draft rules during the Geneva meeting in 1984. A summary of that preliminary exchange of views is contained in document LOS/PCN/SCN.4/L.2, paragraph 2. It was decided to defer further consideration of this subject until the examination of the draft rules was completed.

3. During the fourth session the preamble was the subject of further discussions on the basis of a revised draft (LOS/PCN/SCN.4/CRP.17) prepared by the Secretariat.

4. The first preambular paragraph in that draft made reference in particular to parts XI and XV of the Convention. Several delegations doubted that it was appropriate to single out those specific parts of the Convention since provisions on dispute settlement were also contained in other parts of the Convention. They felt that making reference to parts XI and XV alone was unduly restrictive. The proposal that the paragraph should refer to the relevant provisions of the United Nations Convention on the Law of the Sea met with broad approval. The Special Commission also accepted the suggestion to delete the last part of this paragraph which read "... hereinafter referred to as the 'Convention'," and in the second

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preambular paragraph the words "... hereinafter referred to as the 'Statute'", and to incorporate those descriptions in an article regulating the use of terms at the beginning of the draft rules.

5. Concerning the second preambular paragraph, which made reference to the Statute of the Tribunal, it was proposed to insert the words "in particular", so that the paragraph would read: "Having regard in particular to the Statute of the International Tribunal for the Law of the Sea, annexed thereto;".

6. The Special Commission did not approve the suggestion to delete the third preambular paragraph, which states that, in adopting its rules, the Tribunal was acting in pursuance of article 16 of its Statute. Several delegates argued that was necessary to maintain the reference to article 16 of the Statute, which stipulates that the Tribunal shall frame rules for carrying out its functions. These delegations were of the view that since that was the mandate for the preparation of the rules of the Tribunal, it would have to be reflected in the preamble. The proposal to place the provision on the coming into force of the rules of the Tribunal at the end of the rules was approved.

Article 15

7. This article provides a cross-reference to the procedure before the Tribunal that would apply to the Sea-Bed Disputes Chamber as well, unless there was a specific provision to the contrary in part IV of the rules. The substantive discussion was deferred until the consideration of parts IV and V of the draft rules was completed. When part IV was being discussed, frequent reference was made to that article which appeared to be acceptable.

8. Section C of part I of the draft rules only consists of article 15. One delegation suggested merging sections C and D of part I into a single general section entitled "Special Chambers". Commenting on that proposal the Secretary of the Special Commission pointed out that the location of article 15 in a separate section C distinguished the Sea-Bed Disputes Chamber from the special chambers in section D. The Sea-Bed Disputes Chamber was virtually a separate entity within the Tribunal itself with a different kind of jurisdiction which was exclusive to that Chamber. In addition, the Sea-Bed Disputes Chamber provided access to entities other than States. It also dealt with matters other than the interpretation and application of the Convention. When providing for the organization of the Tribunal, it seemed appropriate to make special reference to the Sea-Bed Disputes Chamber, its constitution and to its functioning as distinct from the Tribunal's special chambers. It functioned separately from, and independent of, the special chambers of the Tribunal. The special chambers were component parts of the Tribunal, functioned in the same way as the Tribunal did and dealt with similar cases to those before the Tribunal. He suggested that thus it might be more appropriate in showing the organizational division of the Tribunal to maintain separate sections - one for the Sea-Bed Disputes Chamber (sect. C) and another for the special chambers (sect. D).

9. The Special Commission shared that view and decided to maintain the article in its present location and wording.

Articles 64 (2), 84 (1) and 88 B

10. Article 84 (1) stipulates that a request for the prescription of provisional measures shall have priority over all other cases while article 88 B (contained in LOS/PCN/SCN.4/WP.2/Add.1) provides that priority over all other cases be given to applications for the prompt release of vessels. When these two provisions were being examined several delegations pointed to the need for clarity as to the relationship between them. The discussion on articles 84 (1) and 88 B is summarized in documents LOS/PCN/SCN.4/L.3/Add.1 and LOS/PCN/SCN.4/L.4/Add.1, respectively.

11. Article 64, dealing with oral proceedings, states in paragraph 2 that the Tribunal, when fixing the date for the oral proceedings, shall have regard to the priority required by article 84 of these rules and to any other special circumstances, including the urgency of a particular case. A summary of the discussion on article 64 is contained in document LOS/PCN/SCN.4/L.3.

12. In the light of the discussion on the above-mentioned three articles the Secretariat submitted a redraft of articles 64 (2) and 84 (1) in document LOS/PCN/SCN.4/1986/CRP.18.

13. As proposed by several delegations the redraft of article 64 (2) also makes reference to article 88 B apart from article 84. Moreover, in response to a proposal by one delegation, the redraft states that the Tribunal, when fixing the date for the oral proceedings, should also take account of the views of the parties.

14. The redrafted paragraph 1 maintains the first sentence of article 84 unchanged. It also contains a second sentence, which provides that such priority should not affect the applications under article 292 of the Convention which will be dealt with without delay. Introducing the redraft, the Secretary of the Special Commission pointed out that in the case of applications for the prompt release of vessels (art. 88 B) there was an urgency established by the Convention itself in article 292, which had to be reflected. That article referred to the fact that applications for prompt release of vessels should be dealt with without delay. No such requirement existed in article 290 of the Convention dealing with provisional measures. However, given the practice of international tribunals concerning provisional measures and, in particular, the practice of the International Court of Justice, the proposed draft rule in article 84 (1) indicated that provisional measures would have priority over all other cases.

15. The changes to article 64 are purely consequential. The Secretary added that, in the reformulation proposed for article 84, a distinction was drawn between cases and applications. The word "case" might be interpreted as a suit or dispute under consideration; whereas an "application under article 292" was of much lesser dimensions. It was only a request for a limited remedy which under article 292 itself did not extend to "the merits of any case" in the domestic forum. That distinction was noted in the course of the discussions, and it appeared to be the only means by which the problem could be dealt with while at the same time

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maintaining the practice of the International Court of Justice. The proposed redraft keeps intact the International Court of Justice practice, and does so in a manner consistent with the urgency established by the Convention itself.

16. The Special Commission approved the redrafted article 84 (1) as submitted by the Secretariat.

17. Concerning the redraft of article 64 (2), one delegation favoured deleting reference to other special circumstances. Since the question of priorities was clarified satisfactorily in the redrafted articles 64 (2) and 84 (1), the remainder of the redrafted articles and also article 88 B (1) could remain unchanged.

Other outstanding matters

18. Following the consideration of the deferred articles, the Special Commission discussed some other outstanding matters for which there was no provision as yet in the draft rules.

(i) Sponsoring States Parties

19. As regards the participation and appearance of sponsoring States Parties, one delegation pointed to the need for accommodating the requirements of article 190 of the Convention when dealing with proceedings under articles 121 and 122 of the rules of the Tribunal. The Special Commission agreed that provision would have to be made either within articles 121 and 122 or in a supplementary article that could follow immediately thereafter. The new provision should cover the case of substitution of a State Party for a natural or juridical person or the reverse situation as specified in article 190 of the Convention. The Special Commission agreed that such a new provision should be incorporated into the revision of the draft rules.

(ii) Rules of the Sea-Bed Disputes Chamber on questions of interpretation of the Convention at the request of commercial arbitral tribunals

20. Attention was drawn by one delegation to the need to make provision in the rules to deal with article 188, paragraph 2 (a), of the Convention. That provision requires any question of interpretation or application of the Convention which needs to be decided in the course of the proceedings before a commercial arbitral tribunal to be submitted to the Sea-Bed Disputes Chamber for a ruling. The need for such a ruling arises because a commercial arbitral tribunal has no competence to determine questions of interpretation or application of the Convention. If such an issue arises in the course of commercial arbitral proceedings, it has to be referred to the Sea-Bed Disputes Chamber before the arbitral tribunal can proceed.

21. The Secretary explained that such an issue would arise in the course of contentious proceedings and could thus be dealt with under the procedure for the submission of disputes. Such a matter was referred to the Sea-Bed Disputes Chamber by the arbitral tribunal itself and not by one of the parties to the dispute. The normal procedure for application in the case of disputes thus could not be applied. In that case the arbitral tribunal could be expected to submit to the

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Sea-Bed Disputes Chamber all the relevant materials including the positions of the parties on the question of interpretation or application of the Convention. Yet there might be a need to permit the parties to submit written material or participate in an oral proceeding before the Sea-Bed Disputes Chamber. Given that need, then the procedure laid down in articles 54 through 60 of the rules of the Tribunal could be applied as appropriate. Some delegations commented on applying the usual contentious procedure. It was suggested that while the parties should be given an opportunity to present their positions yet the procedure should be less cumbersome than in contentious cases. It was also pointed out that a new provision would also have implications on the role of the Registrar.

22. The Special Commission requested the Secretariat to present a draft article on the revision of the rules for dealing with the procedure to be applied by the Sea-Bed Disputes Chamber in deciding on the matters mentioned in article 188 (2) (a) of the Convention.

(iii) Submission to Tribunal of controversies concerning arbitral awards

23. The Secretary of the Special Commission pointed out the need to make provision in the rules of the Tribunal to deal with the submission of controversies under article 12, paragraph 2, of annex VII to the Convention. These controversies relate to the interpretation or implementation of an arbitral award which can be submitted to the Tribunal by agreement of the parties to the dispute. Such a submission would be no different from the reference of a dispute to the Tribunal in accordance with article 21 of the Statute and would be covered by article 31 of the rules of the Tribunal. The reference to agreements under article 12, paragraph 2, of annex VII could be specifically incorporated in article 31 of the draft rules when it is revised. This would also apply to the Special Arbitration under annex VIII.

24. The Special Commission accepted this proposal and requested the Secretariat to take that problem into account when revising the draft rules.

Access by entities other than States Parties

25. Upon conclusion of the article-by-article examination of the draft rules of the Tribunal the Special Commission once again discussed cases where the parties to a dispute were international organizations, in accordance with annex IX to the Convention (referred to in art. 305 (1) (f) of the Convention), consortia or other entities whose components were of more than one nationality, whether such components be other consortia or natural or juridical persons. Those problems had already been the subject of an exchange of views within the Preparatory Commission at its second session. The tenor of that exchange is reflected in document LOS/PCN/SCN.4/L.1. However, the discussion on a few of the issues showed such widely divergent views that the Secretariat was unable to make the relevant provision in the draft rules of the Tribunal. The Secretariat required further guidance, notably on the following two points:

(a) The characteristics of nationality of the above-mentioned entities in connection with the appointment of ad hoc members of the Tribunal under article 17 of the Statute;

(b) The question of competence of an international organization in cases where an international organization is an applicant before the Tribunal or its chambers and the Tribunal *proprio motu* needs to examine, or the respondent claims the right to raise the question of the *locus standi* of the international organization.

Characteristics of nationality of entities other than States

26. During the discussion on the characteristics of nationality of international organizations, some delegates proposed that in cases where several judges, having the nationality of member States of an international organization which was a party to the dispute sit on the bench, the provisions of article 17 (5) of the Statute of the Tribunal dealing with parties in the same interest should apply *mutatis mutandis*. Under these provisions, in cases where several parties form parties in the same interest, they should, for the purposes of article 17, be reckoned as one party. These delegates held the view that it was not justified to treat, on the one hand, several States bound only by the fact that they were parties in the same interest in a dispute as one party while, on the other hand, denying that status to an international organization whose member States were linked in a much closer relationship. Besides, article 17 (5) of the Statute of the Tribunal provided that any doubt on that point was to be settled by the Tribunal. The Tribunal's freedom to decide on the composition of the bench for cases where an international organization or a multinational consortium was a party should not be restricted by detailed procedural rules, in the view of these delegations.

27. Other delegates argued that precise stipulations in the procedural rules as to the composition of the bench in such cases were necessary for the very fact that, before the Tribunal could make decisions pursuant to article 17 of its Statute, there must be clarity about the composition of the bench.

28. The proposal to treat international organizations for the purposes of article 17 of the Statute of the Tribunal as parties in the same interest was opposed with the argument that normally, in proceedings before the International Court of Justice, two or at most three States formed parties in the same interest. However, international organizations often consisted of several member States and it was highly probable that several judges on the bench of the Tribunal would have the nationality of its member States. Treating them as parties in the same interest would endanger the impartiality of the Tribunal. To make sure that in every case the composition of the Tribunal would be such as to guarantee a fair and impartial decision, it was necessary to provide that in those cases where several members of the Tribunal were nationals of member States of an organization party to a dispute only one of those judges should be allowed to take part in the Tribunal's decision-making. Another possibility was to grant the other party to the dispute the right to appoint an equal number of judges of their choice.

29. Some delegations proposed that the principle laid down in article 13 (2) of the Statute should apply and the Tribunal should determine, subject to article 17 of its Statute, which members were available to constitute the Tribunal for a particular dispute. It could thus ensure that when an international organization was a party the number of judges having the nationality of its member States should

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not exceed the number of judges possessing the nationality of the other party to the dispute. The same principle should be applied to disputes involving multinational consortia.

30. Concerning the determination of the "nationality" of consortia whose components were juridical or natural persons of various nationalities, it was proposed to regard those consortia as belonging to the State where they had their head office or where they were registered.

31. Other provisions which in the view of some delegations could be invoked to determine the "nationality" of a multinational consortium are those of article 153 (2) (b) and of article 4 of annex III to the Convention, according to which juridical or natural persons wishing to carry out activities for the exploration or exploitation of resources of the deep sea-bed must be sponsored by one or more State Party to the Convention.

32. It was also proposed that in cases where a multinational consortium was a party to a dispute before the Sea-Bed Disputes Chamber, the rationale of articles 7 and/or 8 of the Statute should be applied. Accordingly, members of that Chamber having the same nationality as juridical or natural persons making up the consortium should not, in that case, sit on the bench.

33. The Special Commission agreed that, as regards the participation of international organizations and multinational consortia in proceedings before the Tribunal and its Chambers, the rules of the Tribunal should provide such solutions as, on the one hand, to assure to all parties to a dispute fair and equitable treatment while, on the other hand, guaranteeing the highest possible standard of efficiency in the proceedings.

34. As for the International Sea-Bed Authority and its Enterprise, the Special Commission was unanimous in its assessment that they were legal subjects of a universal character which did not possess a "nationality" and, therefore, had the right, in case they were party to a dispute before the Tribunal, to appoint ad hoc judges pursuant to article 17 (3) of the Statute of the Tribunal.

Competence of international organizations

35. If the competence of an international organization is unambiguously set out in the declaration to be deposited pursuant to article 5 of annex IX to the Convention and if there is no doubt as regards competence with regard to the given dispute, there are no problems. If, however, such competence is challenged by the other party to the dispute, the international organization concerned and its member States, which are parties to the Convention, may, pursuant to article 5 (5) of annex IX, be requested for further information concerning their competence in respect of any specific question. The organization and the member States concerned have an obligation to provide such information. The right to be informed about the competence of an international organization party to the Convention can be claimed by all States Parties to the Convention. The discussion on this item in the Special Commission reflected general agreement to the effect that such a right must also be available to the Tribunal and its chambers and should most appropriately be laid down in the rules of the Tribunal.

36. In those cases where the international organization is the respondent, article 6 (2) of annex IX provides that any State Party may request an international organization or its member States which are States Parties for information as to who has responsibility in respect of any specific matter. If the organization and the member States concerned fail to provide that information within a reasonable time or if they provide contradictory information, this results in joint and several liability. In these cases the applicant is free to sue either the international organization or its member States or both.

37. The Convention does not, however, make provision for cases where an international organization is the applicant. Where, in these cases, there is lack of clarity concerning the competence of the international organization or the respondent challenges that competence, the Tribunal must decide the question of locus standi. This view was broadly supported in the Special Commission.

38. By contrast some delegates expressed the view that the matter was fully covered by annex IX to the Convention and that beyond that there were no practical implications since an international organization, on the very ground of its internal legal régime, would never take the initiative and sue before the Tribunal in a matter in respect of which it had no competence.

39. This view was contradicted by other delegations which pointed out that the question of the competence of international organizations in connection with disputes before the Tribunal could indeed assume far-reaching practical importance and that therefore the rules of the Tribunal should provide clearly that the Tribunal had the right to decide propio motu on the competence of an international organization as referred to in article 305 (1) and in annex IX to the Convention.

Other pending provisions of the rules

40. During the article-by-article examination of the draft rules the Special Commission had reserved the right to reopen the discussion, if necessary, on articles 34 (1), 40 (6), 43 and 93 after considering the problems relating to access by entities other than States to the Tribunal and its chambers. The Secretary indicated that further examination of those articles was not necessary since the general discussion had provided the necessary answers. The Secretariat was requested to take account of the discussion on access by entities other than States in revising the draft rules, and to formulate the necessary articles.

The question of the seat of the Tribunal

41. On the basis of a report from the Secretariat, which provided preliminary information on the establishment of international courts and tribunals, examining their experience concerning the establishment of their headquarters, notably as regards the time period needed to design and construct those headquarters (see document LOS/PCN/SCN.4/1986/CRP.19), the Special Commission discussed the question of the seat of the Tribunal for the Law of the Sea.

42. In the course of the discussion several delegations drew attention to the fact that the decision on the site of the Tribunal was taken by the Law of the Sea

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Conference subject to the requirement that the State specified as the host country of the Tribunal should have ratified the Convention or acceded to it by the time of its entry into force and should remain a party to it thereafter (for the decision see Third United Nations Conference on the Law of the Sea, Official Records, vol. XV, United Nations, New York, 1983, p. 176).

43. Some delegations expressed concern since the host country identified in the Convention, i.e. the Federal Republic of Germany, had neither signed the Convention nor acceded to it. They felt that there was no assurance that the Federal Republic of Germany would be a party to the Convention when it entered into force. Therefore, they argued, the question of the future seat of the Tribunal required the attention of the Commission.

44. Other delegations were of the view that no premature decision should be made concerning the future seat of the Tribunal. The question would not arise until the entry into force of the Convention, and it might be a few more years until then. Moreover, the Convention had made provision for the seat of the Tribunal. A change to that provision of the Convention would cause juridical problems since the Preparatory Commission was not mandated to change the Convention.

45. The representative of the Federal Republic of Germany reiterated the position of his Government on possible membership of the Federal Republic of Germany in the Convention and, in so doing, pointed to document LOS/PCN.57, where his delegation had outlined its position on the matter. He also explained the progress made as regards site selection and planning for the establishment of the Tribunal at Hamburg.

46. It was repeatedly expressed in the discussion that no one intended to exclude Hamburg as the future seat of the Tribunal. An early accession of the Federal Republic of Germany to the Convention would be an important contribution on the path to the universality of the Convention. It was necessary, however, to take timely precautions in case the Federal Republic of Germany would not be a party to the Convention at the time of its entry into force. In that case the seat of the Tribunal would have to be accorded to a State which was already a party to the Convention. The view was expressed that a final decision on the future seat of the Tribunal could not be made as late as at the time of entry into force of the Convention because by that time - in accordance with resolution I of the Law of the Sea Convention - all necessary arrangements for the commencement of the functions of the Tribunal, including appropriate buildings and technical facilities in working order, must have been completed. Various delegations drew attention to the fact that the report submitted by the Secretariat after analysing the communications it had received from various international courts and tribunals indicated that as a rule a period of several years was required to construct the necessary buildings and equip them to be fully functional. Therefore the Preparatory Commission would have to establish a finite and predictable date by which it would have to determine alternative arrangements for the seat of the Tribunal, so as to conclude its work. That point in time would have to be an appropriate period in advance of the entry into force of the Convention.

47. As regards the juridical aspect of the problem, it was pointed out during the discussion that resolution I of the Law of the Sea Conference mandated the Preparatory Commission to "take all possible measures to ensure the entry into effective operation without undue delay of the Authority and the Tribunal and to make the necessary arrangements for the commencement of their functions". In case the Federal Republic of Germany did not accede to the Convention, that mandate encompassed the need for the Preparatory Commission, sufficiently in advance of entry into force of the Convention, to secure an alternative seat for the Tribunal. That should satisfy the conditions agreed upon by the Law of the Sea Conference when the decision concerning the seat of the Tribunal had been taken. These arrangements of the Preparatory Commission would be referred to the meeting of States Parties to be convened in accordance with annex VI, article 4 of the Convention, for endorsement.

48. The Special Commission agreed to continue its discussion on the problems related to the future seat of the Tribunal at the 1986 summer meetings. It requested the Secretariat to continue to study the question of the preparation of the site of the Tribunal and specified a number of problems on which the Secretariat is to report (see document LOS/PCN/L.33, p. 2 ff.).

49. Since this is a summary of the deliberations, it is not possible fully to reflect all the interventions or to reproduce every suggested formulation. However, the Secretariat has maintained a complete record of all suggestions. The Chairman would be grateful if his attention was drawn to any major omissions.

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AND FOR THE INTERNATIONAL TRIBUNAL
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New York, 11 August-5 September 1986

BRIEF PROGRESS REPORT ON THE PREPARATIONS FOR THE HOUSING OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA IN HAMBURG

(Submitted by the delegation of the Federal Republic of Germany)

1. Immediately after the choice of the Free and Hanseatic City of Hamburg as the seat of the Tribunal, the authorities of the Federal Government and of the City of Hamburg took up preparatory work for the initial planning for the seat of the Tribunal. A working group was established in which Federal Ministries and the authorities of the City of Hamburg were represented.

2. For the site of the Tribunal, a piece of land in the property of the Federal Government has been reserved, which is located in one of the most elegant districts of the City of Hamburg, facing the Elbchaussee and the River Elbe.

3. According to first plans prepared by the City of Hamburg, the International Tribunal for the Law of the Sea is to be centred on the historical villa already in place. A modern building complex has been designed to complete and counter-balance this historical building.

4. The Civil Engineering Department of the City of Hamburg has already worked out general and detailed plans for the main facilities of the Tribunal. According to these plans, the total build-up area for the International Tribunal for the Law of the Sea would amount to some 17,000 square metres, of which, in a first phase, about 11,000 square metres would be realized. Another 6,000 square metres or so might be added later, especially for any supplementary administrative space that might be required.

5. The Civil Engineering Department of the City of Hamburg and the architects laid down their ideas in a working report containing all essential plans and

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drawings, as well as photographs of a first model made in paper work. This working report, which had been finalized by the end of 1982, was made available to officers of the United Nations Office for the Law of the Sea.

6. As a result of discussions between officials of the City of Hamburg and the United Nations Secretariat, more detailed planning work was initiated in early 1984 with the preparation of the necessary ground plans, front and lateral views, as well as sectional drawings, etc. for the whole complex of buildings. In addition, plans of the various elements of construction were drawn up.

7. In September 1984, the Federal Government invited the Special Representative of the Secretary-General for the Law of the Sea, Under-Secretary-General Satya N. Nandan, to Bonn and Hamburg, where he was given the opportunity to see in detail the progress made so far, including the plans and a detailed model formed in wood.

8. Mr. Nandan and his delegation were also shown possibilities for temporary alternative housing for the Tribunal in the event that it has to start work before definite premises are ready. There are several congress and meeting complexes in the City of Hamburg that seem appropriate to serve as a preliminary alternative for the Tribunal. One of the most suitable alternatives is the building of the Hanseatic Court of Appeal (High Court), which is situated just in the centre of the City and offers various courtrooms, as well as all sorts of office rooms.

9. During the visit of the delegation, several technical questions were discussed with the experts accompanying Mr. Nandan, especially with the Head of the Building Division of the United Nations Secretariat. Special consideration was given to details of the courtroom programme and to the long-term need for office space for general administration purposes. In addition, questions of security with regard to the specific conditions of the site of the Tribunal were discussed and special attention was given to the technical arrangements for the access by cars and for the car park.

10. On the basis of these discussions, the floor plans were reviewed and partly corrected in order to meet the needs of the United Nations. Also, studies concerning the overall construction as well as the building materials were initiated. A first survey on costs has also been made.

11. Work continues with a view to drawing up definite and detailed plans for the construction of the International Tribunal for the Law of the Sea, funds for this purpose being allocated in the Federal Budget.

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INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Special Commission 4
New York, 11 August-5 September 1986

CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE REVISED DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

1. The Special Commission decided that, in considering the revision of the draft rules of the Tribunal contained in document LOS/PCN/SCN.4/WP.2/Rev.1, parts I and II, it should employ a method of work that would ensure an expeditious examination focused on the substantive problems while excluding a resumption of the discussion of matters on which it already reached agreement during the first examination of the draft rules. The Special Commission further decided, in accordance with a corresponding recommendation of its bureau, to examine the revised draft rules section by section or, where they were divided into subsections, subsection by subsection.

2. In carrying out its examination of the revised text the Special Commission responded to the following suggestions of the Chairman based on recommendations of the bureau:

(a) The discussions should focus on those draft rules which were new and which the secretariat had formulated on the basis of principles established as a result of a general discussion on the subject by the Special Commission;

(b) Proposals designed to make the wording clearer without affecting the substance in any manner and suggestions to bring the text of one language in line with the texts of the other languages were to be brought to the attention of the secretariat in writing at the end of each meeting;

(c) Suggestions for changes of a substantive nature to the revised text should be made only if the draft article concerned was found to be seriously deficient and unacceptable and if the change proposed was more likely to enjoy the widespread approval of the Special Commission.

3. Prior to the consideration of each section or subsection, the Secretary of the Special Commission outlined in what respects the revised text differed from that contained in document LOS/PCN/SCN.4/WP.2. The rationale for the change as evinced from the discussions and the implications of the provisions were explained.

Preamble

4. The Special Commission decided not to discuss the preamble again since agreement had been reached on its wording already during the fourth session held at Kingston in March/April 1986.

Part I. Introduction

Article 1. Use of terms

5. This is a new article which was formulated by the secretariat in response to the Special Commission's decision that at the beginning of the draft rules there should be an article defining those terms for which definitions were absolutely necessary to avoid ambiguity and those terms for which abbreviations would facilitate the drafting.

6. Following an initial exchange of views on the draft article during which, in particular, the proposal was made not to use the term "expert witness" since it was misleading and in some legal systems uncommon, the secretariat submitted a revised version of the article (see LOS/PCN/SCN.4/1986/CRP.20 of 18 August 1986).

7. This draft proceeds from the awareness that the term "expert" as used in the Convention stands for a person appointed in accordance with article 289 of the Convention to sit with the Tribunal and thus cannot be changed. However a person called at the instance of a party to a dispute or at the instance of the Tribunal to present testimony in the form of expert opinions, based on their special knowledge, skills, experience or training, is usually referred to as an "expert" and no other term could easily be substituted for that either.

8. Thus in the redraft put forward by the secretariat, "expert appointed under article 289 of the Convention" is used to define the first category of appointees.

9. In the discussion the solution proposed by the secretariat in Conference Room Paper No. 20 was found acceptable by several delegations. One delegation favoured the use of the term "expert member" but a number of delegations opposed that proposal. They pointed out that such a term was not used in the Convention and, moreover, could give rise to the misconception that experts appointed under article 289 of the Convention had the same status as members of the Tribunal and could take part in the Tribunal's decisions.

10. A number of delegations urged that the definition of the term "international organization" used in the draft rules of the Tribunal should not differ from the definition of the term used in the Convention.

11. Several delegates felt that draft article 1 contained a number of definitions that were not absolutely necessary and that it should therefore be shortened. One delegation preferred to see the draft article entirely deleted since the meaning of the terms would be clear from any particular context in which they were used. Eventually, the Special Commission agreed to postpone the further consideration of article 1 until the end of the examination of the revised draft. There was agreement that only such definitions should be included in article 1 as were absolutely necessary.

Part II. The Tribunal

Section A. Members and experts

12. In introducing the first subsection of this section containing provisions on members and members *ad hoc* of the Tribunal and on experts appointed under article 289 of the Convention, the Secretary of the Special Commission pointed out that in making the revision only drafting changes had been made to the text contained in document LOS/PCN/SCN.4/WP.2. In particular the term "judge" had been replaced by "member", article 2 had been supplemented by a third paragraph providing a definition of the term "*ad hoc* member of the Tribunal", the declarations to be made by members and *ad hoc* members of the Tribunal and by experts appointed under articles 5 and 10 of the draft rules, had been amended in accordance with the texts contained in document LOS/PCN/SCN.4/1986/CRP.15, which the Special Commission had adopted, and drafting changes had been made to articles 6, 8 (2) and 10.

13. The Special Commission decided to postpone consideration of article 2 (3) just as it had done with regard to article 1 on the use of terms until the end of the examination of the revised draft rules.

14. In the course of the examination of this section a number of delegations made proposals designed to make the language more precise or to establish concordance among the various languages, without changing the substance.

15. In relation to article 6 (2), it was proposed that the resignation of the President should not be communicated to the Tribunal but to the Vice-President or senior member. That suggestion met with some support. A further suggestion to delete the reference to article 5 (4) of the Statute was acceptable to some delegations but not to others.

16. In relation to article 8 (1), it was suggested that the clause clarifying how members *ad hoc* would be chosen was unnecessary since it would be dealt with in article 2.

Section B. The presidency of the Tribunal

17. Section B comprises articles 11 to 15. No changes were made in revising the section apart from the use of the term "members" instead of "judges".

18. Article 11 (2) provides that the elections to the presidency and vice-presidency of the Tribunal shall be held on the date of the beginning of the terms of office of the members of the Tribunal or shortly thereafter. Some delegations felt that it was too vague since the first term of office of the members of the Tribunal was determined by the date of their election by the Meeting of States Parties to be convened under article 4 of the Statute. One delegation therefore proposed that article 11 (2) should be more specific in that the elections to the presidency and vice-presidency should take place one week after the beginning of the terms of office of the members of the Tribunal. Against that proposal, it was argued that the present wording of article 11 (2) gave the Tribunal sufficient flexibility in fixing the date of elections to its presidency and vice-presidency. Another proposal was to replace the reference to "shortly thereafter" by an indication that it should be as soon as possible after the commencement of the terms of office.

19. A proposal concerning article 13 was to add to the President's functions the signing of judgements in accordance with article 30 (4) of the Statute.

Section C. The Sea-Bed Disputes Chamber

20. In revising this section, which consists only of article 16, the phrase "unless otherwise provided" was substituted for "unless specifically provided". That was the only change. The proposal of one delegation to delete the article did not meet with general agreement. However, some delegations felt that the article was too complicated and that clearer language should be used. One delegation proposed that the substance of the second sentence of the article be incorporated into article 121 of the rules.

Section D. Special chambers

21. In introducing this section, which comprises articles 17 to 20, the Secretary pointed out that no change had been made to article 17 and that only minor changes had been made in article 18 to provide for the selection of a substitute to sit in place of a member who was unable to sit in a particular phase of the case.

22. With regard to articles 17 (3) and 18 (3), one delegation pointed out the risk that the senior member of the Tribunal could be from the same country as a party to the dispute. It was therefore suggested that the President of the Tribunal should designate which of the two substitutes would sit in that particular case.

23. Several delegations supported a proposal to supplement article 18 (2), which deals with the election of the members of the standing special chambers, in such a way that account would also be taken of the representation of each principal legal system. Other delegations opposed that proposal since these chambers might consist of less numbers than the number required to provide representation of all the regions or systems. One delegation suggested to add to article 18 (2) the concept referred to in the last sentence of article 20 (1).

24. In article 19 (3) the words "the Tribunal shall designate ..." were substituted for the words "the Tribunal shall determine".

25. The Secretary also pointed out that to reflect the trend of the discussion in the Special Commission, article 20 (1) had been changed to take into account the provisions of article 2 (2) of the Statute. In revising article 20 (3), a change was needed since it was the President of the Tribunal, and not of the Chamber, who was given the power to give effect to the provisions of article 17 (4) of the Statute to the chambers.

26. Concerning article 20 (1), which covers elections to the chambers, among others the following suggestions were made:

(a) In the second sentence, consistent with the principle applicable to election of the members of the Tribunal, elections to the chambers should also be by a majority of members present and voting. That was not acceptable to other delegations;

(b) The last sentence, which provides that in elections to the chambers, to the extent applicable, due regard should be paid to the provisions of article 2 (2) of the Statute should be deleted. Some delegations, in supporting that suggestion, pointed out, among other things, that article 2 (2) of the Statute provided for the composition of the Tribunal as a whole. Other delegations opposed the deletion of the sentence. In so doing, they argued that the sentence, which the Secretariat had formulated as a result of the discussion during the first reading of the draft rules, was a compromise formula worded to allow for flexibility in its application;

(c) The first sentence of article 20 (1) should be supplemented by specifying that it was only elections to those chambers to which members were elected that such elections should be by secret ballot. That suggestion was supported by several delegations, and it was clarified that it should also apply to the Sea-Bed Disputes Chamber;

(d) As regards the final sentence of the paragraph, it was proposed that the reference to article 2 (2) of the Statute should be qualified as being to the spirit of that article since the provision there was in relation to the Tribunal as a whole. Some delegations were not supportive of the suggestion. A further qualification suggested was that the principle should also be applied to the election of substitutes.

Section E. International functioning of the Tribunal

27. This section comprises articles 21 to 23. In introducing this section the Secretary pointed out that, while changes had been made to article 21, article 22 had been reworded only in paragraph 2 to bring out more clearly the responsibilities of the members of the Tribunal.

28. He added that in article 23 (2), the role of experts appointed under article 289 of the Convention in the Tribunal's juridical deliberations was more clearly defined.

29. In the discussion on this section it was proposed that in article 21 reference to the provisions of the Convention should be deleted. That was not supported. In

article 23 (2), it was proposed that the reference to article 10 of those rules should be deleted. That proposal was supported by other delegations.

30. One delegation favoured providing for the internal functioning of the Tribunal in a separate document rather than in the rules of the Tribunal. That did not attract support.

Part III. The Registry

31. In introducing the revision of this part, which comprises articles 24 to 31, the Secretary of the Special Commission pointed out the following changes, among others, that had been made to document LOS/PCN/SCN.4/WP.2:

(a) Article 25 was amended in the sense that the Tribunal may also elect an Assistant-Registrar to carry out the functions relating to the Sea-Bed Disputes Chamber if it considers this necessary;

(b) Article 26, paragraph 1, contains the wording of the declaration to be made by the Registrar, the Deputy-Registrar and, if appointed, also by the Assistant-Registrar. Concordance was established between the wording of the declaration and that to be made by the members of the Tribunal under article 5 of the draft rules;

(c) Paragraph 2 of article 27 is new. The requirements to be observed under this paragraph in the recruitment of staff for the Registry follow the wording of article 101 of the Charter of the United Nations;

(d) The wording of the declaration to be made by staff members under paragraph 3 of article 27 was also brought into line with article 5 of the draft rules;

(e) Paragraph 1 of article 28, which lays down the tasks of the Registrar, was made more specific or amended in the light of the discussion during the first examination of the draft rules;

(f) Article 31 was supplemented by a time-limit by which the Registrar, the Deputy-Registrar and, if appointed, the Assistant-Registrar have to tender notices of resignation to the President.

32. Some delegations, in discussing article 25, were against the introduction of the post of an Assistant-Registrar in order to minimize the costs of the Tribunal. They felt that the Tribunal should be structured in such a way that it could work effectively with a minimum staff. Should additional administrative personnel prove necessary at a later stage, the Tribunal itself could decide. Some delegations considered it necessary while some who doubted the need for the post of an Assistant-Registrar were able to accept article 25 in the flexible form presented by the secretariat.

33. One delegation suggested making it clear in article 25 that the Registrar, the Deputy-Registrar and, if appointed, the Assistant-Registrar should have different nationalities. This proposal was supported by some delegations but opposed by others. They pointed to the tested practice of the International Court in the appointment of the Registrar and the other staff members and proposed that the Tribunal should follow the same practice.

34. Some delegations considered article 27 (2) superfluous. They argued that an amendment of such a nature had not been agreed during the first reading of the draft rules.

35. One delegation felt that the time-limit of one month set in article 31 for the tendering of notice of resignation by the Registrar was too short.

36. In the course of the examination of the revised draft rules, a number of other proposals of a drafting nature were made which were submitted to the secretariat in writing. They involved suggestions to bring the text of one language in line with the texts of the other languages and proposals designed to make the wording clearer without affecting the substance in any manner. Since this is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The secretariat has maintained a complete record of all suggestions and they will be taken into account in preparing the second revision of the text. Should any delegation feel that an important matter has been omitted, the Chairman would appreciate being informed.

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CHAIRMAN'S SUMMARY OF DISCUSSIONS ON THE DRAFT RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Addendum

Part IV. Proceedings in Disputes

Section A. Declarations, agreements, communications and notices

The Secretary explained that in view of the discussions, the articles on these questions in the original text had now been divided into two separate subsections; one dealing with declarations and agreements and the other with communications and notices.

Subsection 1. Declarations and agreements

Articles 32-34

The revised text of this subsection contains a number of substantive changes compared to the original wording in document LOS/PCN/SCN.4/WP.2. In particular, new provisions were included concerning declarations accepting the jurisdiction of the Tribunal to be made by entities other than States Parties to the Convention. Moreover, the provisions with regard to declarations were separated from those dealing with agreements. It specified what declarations or agreements should be deposited with the Registrar either as originals - in cases where originals are to be deposited - or as authenticated or certified copies, where the original is to be deposited with the Secretary-General of the United Nations or some other institution.

The discussion focused on the question whether entities other than States Parties to the Convention should be required to make such declarations and, if so, in what cases would they be so required. There was a suggestion that the Rules would deal separately with the Tribunal and the Sea-Bed Disputes Chamber.

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In the discussion attention was drawn to the following categories of entities:

- entities other than States Parties to the Convention, to which the dispute settlement procedures are open in accordance with article 291, paragraph 2 of the Convention when they are parties to a dispute submitted to the Sea-Bed Disputes Chamber. The International Sea-Bed Authority and its Enterprises are also grouped in this category.

- entities other than States Parties to the Convention submitting to the jurisdiction of the Tribunal, in accordance with article 288, paragraph 2 of the Convention in disputes concerning the interpretation or application of an international agreement related to the purposes of the Convention.

There was general agreement to the effect that the Rules of the Tribunal should facilitate access to the Tribunal and to its chambers. Therefore, the conditions governing access to the Tribunal as laid down in the Rules should not be expanded. In this connection some delegations pointed out that article 32, paragraph 2, and article 33 of the Revised Draft Rules may be too detailed, going beyond the relevant provisions of the Convention and the Statute of the Tribunal. It was suggested that in relation to article 33, paragraph 1, there was no need to specify that the agreements could be general or special and that the corresponding language could be deleted. It was also suggested that the second sentence of the paragraph could be incorporated into the start of the paragraph.

Regarding article 33, paragraph 2, it was argued that it was not necessary to specify that what was being accepted was the jurisdiction of the Tribunal or the Chamber but that the acceptance could be to the terms and conditions of the Statute, the Rules and the agreement conferring jurisdiction. Those delegations felt that acceptance of the jurisdiction of the Tribunal by entities other than States Parties to the Convention presupposed their readiness to fulfil the obligations arising therefrom. Anyone claiming rights must also be prepared to meet the attendant obligations. Therefore, a separate provision covering a declaration on acceptance of the obligations arising from article 296 of the Convention and the Statute of the Tribunal was not required. A counter view was that a declaration provided a specific acceptance of jurisdiction which cleared all doubts on the question, and was thus necessary.

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On the question of the submission of a declaration by the International Sea-Bed Authority or its Enterprise, there was a general agreement that for those entities the Convention was the constitutive instrument. It was widely felt that since both entities were bound by the Convention and its requirements, there was no need for them to make declarations pursuant to article 32, paragraph 2, of the Draft Rules. One trend in the discussion was that there was no need for declarations by entities who were parties before the Sea-Bed Disputes Chamber in disputes relating to the interpretation or application of Part XI of the Convention or in contractual matters governed by Part XI, Section V of the Convention since the jurisdiction of the Sea-Bed Disputes Chamber for such disputes was laid down in the Convention itself in binding terms.

As regards those entities which accept the jurisdiction of the Tribunal or its Sea-Bed Disputes Chamber on the basis of an agreement referred to in article 288, paragraph 2 of the Convention, some delegations argued that in the usual case the agreement itself would set out the requirement to satisfy the obligations imposed by the Convention on parties to a dispute. These included the obligations to comply in good faith with the decisions of the Tribunal and to pay the relevant costs of the Tribunal. Those delegations were therefore of the view that States or entities other than States Parties to the Convention need not make a declaration. Amendments were therefore proposed to articles 32 and 33 which are designed to couch these provisions in more general terms thereby simplifying them.

However, other delegations were of the view that the parties to an agreement as referred to in article 288, paragraph 2, of the Convention, which merely confers jurisdiction on the Tribunal without laying down the consequential obligations arising from those provisions for the parties to a dispute, should make a declaration pursuant to article 33 of the Draft Rules. This would be in line with and secure the principle of equality of the parties to a dispute as regards their legal obligations under international law.

Subsection 2. Communications and notices

Articles 35 and 36

This subsection comprises articles 35 and 36. While article 35 remained unchanged, article 36 was supplemented to provide for the manner in which notices shall be served on entities other than States.

One delegation proposed that in article 36, paragraph 2, the entirety of the relevant part of resolution II governing preparatory investments in pioneer activities relating to polymetallic nodules (para. 1 (c)), should be repeated, but this was not supported. Another suggestion was that the resolution should be referred to more specifically by identifying it as a resolution of the Third United Nations Conference on the Law of the Sea.

Section B. The composition of the Tribunal for particular cases

Articles 37-43

In revising this set of articles, namely, articles 37-42 (arts. 34-39 in the original working paper, document LOS/PCN/SCN.4/WP.2), the changes related primarily to the reference to "judge *ad hoc*" being changed to "member *ad hoc*". Article 39 also has a change reflecting the manner of settling disagreements in the application of article 8 of the Statute. In article 40, the applicable time limits were made more specific and the manner in which members *ad hoc* may be replaced has been clarified. Article 43 is new and deals with the question of appointment of members *ad hoc* and the composition of the Tribunal in cases where an international organization referred to in article 1 of Annex IX of the Convention, or entities other than States, are parties to a dispute.

With regard to article 39, paragraph 2, one delegation suggested that there should be a provision indicating how the President should deal with the confidential data transmitted to him by a party to a dispute. The same delegation felt that the parties should not be called on to give their observations but rather to state their objections, if any, to the choice of a member *ad hoc* by the other party. This was opposed by other delegations who argued that the rights of the parties to a dispute would thus be restricted. Some delegations made the proposal to supplement article 42, paragraph 2 by a provision on *ad hoc* members.

With regard to article 43, paragraph 1, which provides that an international organization of a universal character which is a party to a dispute before the Tribunal may appoint an *ad hoc* member of any nationality it chooses, one delegation suggested to amend this paragraph in the light of article 3, paragraph 1, of the Statute of the Tribunal. That article provides that no two members of the Tribunal may be nationals of the same State. It was therefore suggested by that delegation that the provision in paragraph 1 should be subject to the corresponding provision of the Statute (art. 3, para. 1).

Another delegation felt that article 43, paragraph 1 should more clearly reflect the fact that the Enterprise is not an international organization of a universal character but an organ of the Authority.

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A number of delegations favoured deleting the last sentence of article 43, paragraph 1. They argued that since it was to be expected that all members of the Tribunal would have the nationality of member States of the respective international organization of universal character there was no need to grant that organization the right to appoint members ad hoc. Article 17 of the Statute of the Tribunal, they argued, was therefore not applicable to such international organizations. Opposing this view other delegations spoke in favour of retaining the last sentence of paragraph 1.

Some delegations had reservations as to the effect of paragraph 3. They expressed the view that the purpose of this paragraph was to achieve on the bench a precise numerical equality of members ad hoc reflecting the nationalities of the parties. In their view, such an objective was based on a misunderstanding of the institution of ad hoc judges and of the role of international judges generally since international judges do not represent the States whose nationals they are. Rather, they are required to be independent and impartial, and they have to make a decision regardless of their nationality. The purpose of members ad hoc was to ensure that the parties to a particular case have confidence in the Tribunal, and in particular that they could trust that their own national law and circumstances would be fully understood by the Tribunal, which was particularly important during the Tribunal's internal deliberations. At that stage the parties to the case would not be present and would not have the opportunity to clear up misconceptions or to answer questions that may arise subsequent to the oral hearing. Therefore, these delegations argued, a single party to a dispute should not have the right to appoint more than one member ad hoc.

The same delegations held the view that paragraph 4 of this article, which attempts to make provision for a highly specific and intricate case, should be deleted. The case addressed in this paragraph, they pointed out, underlined the need to find a much more flexible solution for paragraph 3. Such a provision could empower the President of the Tribunal to request a member having the nationality of a member State of an organization to withdraw or, in the alternative to invite the other party to choose a member ad hoc. The President should, of course, exercise any such power in full consultation with the parties to the case. The organization would, in any event, be able to take the initiative under paragraph 6 of article 43 and request that a member of the Tribunal having the nationality of one of its member States withdraw from the bench.

Other delegations opposed substantive changes to article 43. This article, they argued, assured a well-balanced representation of the interests of the parties to a dispute in relation to the composition of the bench. The nationality of the members of the Tribunal, they felt, was an important factor that must be not be under-estimated. Article 43 was an adequate reflection of the principles laid down in article 17 of the Statute of the Tribunal.

There appeared to be a trend suggesting that elected members of the Tribunal could be asked to stand down to achieve the objective of securing a balance in the representation on the bench of the nationalities of the parties. This approach seemed preferable to the concept that a party could appoint several members *ad hoc* to secure such a balance in the nationality of members composing the bench.

Section C. Proceedings before the Tribunal

Subsection 1. Institution of proceedings

Articles 44-48

In introducing the revision of this subsection, which contains articles 44-48 the Secretary of the Special Commission pointed out that in particular article 44, paragraph 5 was reformulated in order to bring it into conformity with the relevant provisions of the Convention. Article 47 was also reformulated. Paragraphs 2-4 of that article are new. Only minor changes were made to the other articles.

Concerning article 44, paragraph 3, it was proposed that rather than referring to the competent authority for foreign affairs, the reference should be to the competent governmental authority.

With regard to article 44, paragraph 5, some delegations suggested examining whether or not the references to specific parts of the Convention appearing at the beginning of the paragraph could be deleted. Those against it argued that the deletion of these references would leave the provision open to numerous interpretations. They felt that these references were necessary in order to ensure consistency with article 287 and other relevant provisions of the Convention. Rather than making reference to declarations being in accordance with article 287, paragraphs 4 and 5, the text should provide that such declarations should satisfy the requirements of that article.

As for article 45, paragraph 2, some delegations favoured the deletion of the reference to the special agreement having been previously transmitted to the other party in accordance with article 34 of the rules.

Concerning article 47, a number of delegations wanted the relationship between paragraphs 1, 3 and 4 clarified. One delegation suggested deleting paragraph 4 of this article, but this suggestion was not supported.

As for article 48, a proposal was made to reformulate it in a more specific form, particularly as to what should be given to the Registrar. For this purpose a number of drafting as well as substantive suggestions were submitted to the Secretariat.

Subsection 2. Representation of parties

Articles 49-51

In revising this subsection the specific provisions on the privileges, immunities and facilities accorded to agents, counsel and advocates of parties before the Tribunal were deleted. It was decided that this subject-matter be dealt with in the Headquarters Agreement as appropriate and in a separate agreement on Privileges and Immunities rather than in the Rules of the Tribunal.

With regard to article 49 the suggestion was made to replace the word "They" in paragraph 2 by the word "The parties ...". As regards paragraph 3 of this article, a number of delegations preferred to place it in subsection 2 of section D, dealing with the Prompt Release of Vessels and Crews. Opposing this proposal, other delegations pointed out that this paragraph represented a compromise formula worked out as a result of detailed discussions and that section C, subsection 2, was the proper place for this provision since it dealt with the representation of States before the Tribunal.

One delegation advocated deleting also the basic provision on this matter contained in article 50. It argued that while the members of the Tribunal can formulate and modify the Rules of the Tribunal they cannot grant privileges, immunities and facilities, which can only be done by States Parties to the Convention. However, this was opposed by others.

Some delegations wanted article 51 deleted. They were concerned that it might lead to curtailing the rights of parties to have the assistance of counsel or advocates before the Tribunal. Other delegations considered this article indispensable. They reasoned that there were provisions to this effect also in domestic law.

In the course of further discussion of this article, a number of proposals was put forward as being intended to achieve greater precision. Thus, it was suggested to clarify that an order of the Tribunal excluding an agent, counsel or advocate from the proceedings should have effect only after the person concerned was afforded an opportunity to defend himself before the Tribunal. It was also suggested that, in relation to paragraph 2, the party whose counsel or advocate was excluded from the proceedings had not only the right to appoint another but should also have a reasonable opportunity to do so.

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Subsection 3. Proceedings

Articles 52 and 53

In revising this subsection, which comprises articles 52 and 53, only minor changes were made to article 52. It was suggested that provision should also be made to permit "rejoinders" in addition to "replies". Such additional responses should be permitted only when the Tribunal so authorizes. As regards paragraph 5 of this article, it was suggested that the sequence of identifying who may be heard before the Tribunal should be reversed. However, others pointed out that the present sequence was appropriate since it identified them in the order in which they would be heard in the course of proceedings.

As for article 53, it was proposed that it should require the President to summon together the agents of the parties to meet with him. This was opposed with the argument that the President's discretion to meet with the agents of the parties either separately or together should not be curtailed. The present formulation allowed the President to ascertain the views by the most expeditious means, thus avoiding undue delay, while yet giving him the power to summon the agents if he considers that necessary in the light of conflicting views of the parties.

Subsection 4. Written proceedings

Articles 54-63

In introducing this subsection, which comprises articles 54-63, the Secretary of the Special Commission pointed out that only minor changes had been made in revising the section. These changes involve only articles 54, 61 and 62.

With regards to article 54, paragraph 3, it was suggested that it should indicate in the last sentence that the Tribunal would impose a time-limit for a party to state its views. This suggestion was not opposed. Also, some delegations felt that in the first sentence of paragraph 4 the phrase "... but without prejudice to any subsequent decision of the Tribunal" should be deleted since it was not needed, nor was such a provision contained elsewhere in the draft Rules. Another view was that the overriding power of the Tribunal for which there was provision in the latter part of that paragraph should not be derogated from merely because it may not be sitting, and because it may be expeditious to allow the President to carry out an initial attempt at obtaining and reconciling the views of the parties.

One delegation saw a need for harmonizing the provisions of article 54, paragraph 4, article 55, paragraph 2, and article 56, paragraph 2. A number of drafting proposals were submitted to this effect. Other delegations recalled that the articles in this subsection were modelled on the relevant provisions of the Rules of the International Court of Justice, which had stood their test in practice for a long time and from which one should only deviate where this was fully justified and necessary. They preferred to keep the present subsection as it stands.

As regards article 57, a view that was not opposed was that before the Tribunal decides on joining proceedings in more than one case, it should consult with the parties to those disputes.

Article 60, which deals with the provision of certified copies, was commented on by one delegation who suggested that mention should be made as to who is to certify those copies. Also, the earlier suggestion in discussing article 52 and which related to this article is that the fourth paragraph of article 52 should be transferred as a fourth paragraph to article 60.

Concerning article 61, paragraph 4, in the view of one delegation, the Tribunal should not be obliged to authorize the use of a language other than an official language, and consequently, in that view, the discretion of the Tribunal should be provided for. However, this proposal was not supported by others.

In article 62, paragraph 2, one delegation felt that the date to be recorded on the proceedings should be indicated as being the date on which they are filed. That delegation wanted the rest of the paragraph deleted. However, this was not generally agreed.

Subsection 5. Oral proceedings

Articles 64-82

In his introduction the Secretary of the Special Commission pointed out that in this subsection which comprises articles 64-82, articles 64, paragraph 2, and 79, paragraph 4, had been changed to bring them in line with the agreed formulations contained in the Conference Room Papers (LOS/PCN/SCN.4/CRP.7 and 18). Apart from that change, only minor changes to articles 69, 75, 78, 79 and 81 had been made in the revision.

In the second sentence of article 67, one delegation suggested that reference be made to "the list" instead of "a list".

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Some delegations were of the view that article 69 should also make provision for a situation where one party accepts that the hearing shall be public while the other party demands that the public not be admitted. One delegation advocated the deletion of the final part of the last sentence in accordance with which the decisions as to whether the hearing should be public or private could be made at any time.

With respect to article 72, one delegation suggested harmonizing the formulations of the two paragraphs in relation to the Tribunal considering it necessary to take action in these situations. Similarly in that view, the second paragraph of article 73 should also be brought in line.

Although it was provided in article 73, paragraph 2, one delegation said that the President should not be granted the right to take the necessary steps for the examination of witnesses if the Tribunal is not sitting. This right he argued should be accorded only to the Tribunal itself.

Several delegations felt that article 79, paragraph 3, should also be applicable to organizations referred to in article 1, paragraph 4, of these Rules. The counter argument of other delegations was that this should not be the case and that the paragraph reflected the text approved by the Special Commission as submitted by the Secretariat in Conference Room Paper 7 (LOS/PCN/SCN.4/CRP.7). Therefore, they felt that article 79, paragraph 4, should not be changed.

As regards article 81, one view was that it should revert to its original form which corresponded to article 71 of the ICJ Rules.

Section D. Incidental proceedings

Subsection 1. Provisional measures

Articles 83-88

The Secretary of the Special Commission explained that in revising article 83, reference had been made to the Sea-Bed Disputes Chamber and to article 290 of the Convention.

There was support for the proposition that the content of article 75, paragraph 2, of the Rules of the ICJ should be incorporated in the Tribunal's Rules. This proposal would permit the Tribunal to indicate measures other than those that have been requested.

In article 84 the approved text in Conference Room Paper 18 (LOS/PCN/SCN.4/CRP.18) had been included in paragraph 1 whereas paragraphs 2-4 followed the agreed formulation in Conference Room Paper 10 (LOS/PCN/SCN.4/CRP.10. Paragraph 3 was supplemented by a reference to the Chamber of Summary Procedure.

One delegation suggested the rewording of article 84, paragraph 1 to the effect that it should be left to the Tribunal to decide whether or not to give priority in a given situation when there is a request for the prescription of provisional measures or an application under article 292 of the Convention.

Other delegations, speaking against this proposal, pointed out that article 84, paragraph 1, article 90, paragraph 1, and article 64, paragraph 2 represented a result of protracted negotiations by the Special Commission and that the compromise found must not be called into question.

Another delegation suggested that in the third paragraph, the date to be fixed for a hearing should be the earliest possible date, and also that in the final sentence of that paragraph, it should be made clear that the observations to be presented should be by a party. These two suggestions were well received.

With reference to article 87, one delegation suggested its deletion, and in any event that delegation pointed out that reference should be made to the measures prescribed rather than those indicated to bring it in line with article 290 of the Convention. It was further suggested that the word "communicated" be replaced by the word "notified" consistent with the usage of paragraph 4 of article 290 of the Convention.

Subsection 2. Prompt release of vessels and crews

Articles 89-93

In introducing this subsection the Secretary of the Special Commission pointed out that articles 89 to 91 and article 93 were formulated more precisely and some additions were made in making the revision on the basis of the discussions held on the articles in document LOS/PCN/SCN.4/WP.2/Add.1.

Thus, among other things, the compromise formula concerning the relationship between article 292 of the Convention and article 84, paragraph 1, article 90, paragraph 1 of the draft Rules, contained in Conference Room Paper 18 (LOS/PCN/SCN.4/CRP.18), was incorporated in the revised text.

As regards article 89, paragraph 1 several delegations were in favour of deleting the second sentence of this paragraph on the grounds that the substance of this sentence was already covered by article 292 of the Convention and by the first sentence of article 89, paragraph 1 of these rules.

Concerning the fourth paragraph of this article, it was suggested that before referring to the statement of facts, there should be a reference to applications in accordance to article 90, paragraph 3, of the Rules.

Concerning article 90, paragraph 1 several delegations suggested that it should be left to the Tribunal itself to set whatever priorities it may choose regarding applications for the prompt release of vessels. Other delegations recalled that article 90, paragraph 1 formed part of the package adopted in connection with Conference Room Paper 18 (LOS/PCN/SCN.4/CRP.18) and it should not be reopened for discussion.

As for paragraph 2 of that article, some delegations felt that the period of two weeks to fix the date of hearing was excessive. It was suggested that the reference should be to "the earliest practicable date", which should not exceed 10 days of the receipt of the application. Some other delegations considered the two-week period as being appropriate. Some delegations considered the final part of the paragraph to be redundant and suggested the deletion of the reference to the Tribunal or chamber, taking into account the oral or written observations.

With reference to paragraph 3, a proposal was made to incorporate in the text a reference to the fact that the notice of application to be sent to the detaining State should make reference to the fact that the Tribunal itself has indicated that the case would be dealt with by the Chamber of Summary Procedure unless the detaining State objects thereto.

With regard to article 91, paragraph 1 a number of delegations favoured the deletion in the first sentence of the words "... which shall not exceed the value of the vessel ..." on the grounds that this provision had no basis in the Convention. In practice, in quite a number of cases, they argued, the damage caused by a vessel far exceeded the value of the vessel itself. There was no justification, therefore, for curtailing the discretionary powers of the Tribunal. Other delegations preferred to keep this provision, arguing that the demand for the deposit of a bond or other financial security exceeding the value of the vessel was unrealistic and could not be regarded as reasonable. It was also pointed out that the reference in the second line should be to the "vessel and its crew" rather than "vessel or its crew" which was reflected there.

Several delegations proposed the deletion of that part of the last sentence of article 91, paragraph 1, which referred to "government ships operated for commercial purposes". They felt that this provision was touching upon a substantive issue and could not be taken care of in procedural rules. Other delegations wanted to keep this provision since it reflected long-standing international practice. Moreover, the provision in question not only meets the interests of the flag-States of the vessels concerned but also those of coastal States. A compromise suggestion which appeared to attract support was to delete the reference to government ships and to indicate merely that the Tribunal or chamber may consider a State guarantee to be sufficient security.

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With regard to article 91, paragraph 3 it was suggested that it should be made clear that the Registrar does not order release of a vessel or its crew but merely notifies the detaining State of the order of the Tribunal.

Several delegations felt that article 93, paragraph 2 should also make allowance for a situation in which a bond or other financial security posted with the Tribunal is not sufficient to satisfy the final judgement or award of the appropriate domestic forum of the detaining States.

In the course of the examination of the revised draft rules, a number of other proposals of a drafting nature were made which were submitted to the Secretariat in writing. They involved suggestions to bring the text of one language in line with the texts of the other languages and proposals designed to make the wording clearer without affecting the substance in any manner. Since this is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and they will be taken into account in revising the text. The Chairman would appreciate being informed should any delegation feel that an important matter has been omitted in this summary.

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SECOND REPORT ON PRACTICAL ARRANGEMENTS FOR THE INSTALLATION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AT HAMBURG

(Submitted by the delegation of the Federal Republic of Germany)

1. On 2 September 1986, the Federal Republic of Germany forwarded to the Preparatory Commission a Brief progress report on the preparations for the housing of the International Tribunal for the Law of the Sea in Hamburg, which was distributed as document LOS/PCN/SCN.4/L.6. Before the report was drawn up, the competent United Nations bodies were briefed by Professor Kossak, Clerk of Works, on behalf of the Civil Engineering Department of the City of Hamburg, in New York on 10 and 11 March 1983, and a delegation from the United Nations, led by Under-Secretary-General Satya N. Nandan, Special Representative of the Secretary-General for the Law of the Sea, and including Mr. Gritakumar E. Chitty, Secretary of Special Commission 4, visited Hamburg from 11 to 14 September 1984, where they met with Mayor von Dohnanyi, President of the Senate of the Free and Hanseatic City of Hamburg.

2. On 24 June 1986, responsibility within the Federal Government for matters concerning the International Tribunal for the Law of the Sea was assigned to the Federal Minister of Justice. Since then, the Federal Ministry of Justice has:

(a) In co-operation with the Free and Hanseatic City of Hamburg, taken the necessary steps to provide and build on the land earmarked for the Tribunal;

(b) Resolved questions concerning the financing by the Federal Republic of Germany and the Free and Hanseatic City of Hamburg of the capital costs of the International Tribunal;

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(c) Drawn up more detailed plans for the premises of the Tribunal on the basis of documents made available to the Federal Government by several international courts;

(d) Ensured the provision of temporary accommodation which will enable the International Tribunal to take up its work in the Free and Hanseatic City of Hamburg without impairment from the date of its establishment.

3. An area of parkland owned by the Federal Republic of Germany in the Nienstedten district of Hamburg, directly adjacent to the river Elbe, is available for the International Tribunal. It was shown to the delegation of the United Nations in September 1984. All those concerned have found the property to be eminently suited to the needs of the International Tribunal for the following reasons:

(a) Its imposing location overlooking the Elbe in one of Hamburg's foremost residential areas;

(b) Its large area of 28,396 square metres; and

(c) The fact that it is easily accessible from the motorway and is well served by the local public-transport network.

The site has been earmarked by the relevant authorities in the Federal Republic of Germany for the construction of the premises of the International Tribunal. The Free and Hanseatic City of Hamburg has initiated the final steps required to ensure construction on the site in accordance with the needs of the Tribunal.

4. As regards the financing of the capital cost for the main building of the International Tribunal, the Federal Government, after consulting with the Free and Hanseatic City of Hamburg, took the following decision on 17 December 1986:

> "The Federal Republic of Germany is prepared to construct the main building of the International Tribunal for the Law of the Sea at its own expense and to make it available to the Tribunal in accordance with the international practice that has evolved for the provision of premises to United Nations bodies."

This decision, conveyed to the Preparatory Commission on 9 February 1987, ensures that the capital cost of the main building will be met by the Federal Republic of Germany, i.e., by the Federal Government and, to a considerable extent, by the Free and Hanseatic City of Hamburg, and that the building will be handed over for the use of the International Tribunal on the basis of an agreement to that effect to be concluded with the competent international authorities.

5. To prepare the planning of the seat of the International Tribunal, an initial draft plan was outlined to the relevant United Nations authorities in New York in March 1983 as well as in Hamburg in September 1984. This draft was based on information provided by the United Nations concerning the likely requirements of the Tribunal in terms of space and staff, as set forth in a report by the

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Secretary-General of the United Nations on the financial implications of the United Nations Convention on the Law of the Sea (A/CONF.62/L.65, 20 February 1981). In addition, the Preparatory Commission had asked for documentation on the establishment of other international courts (LOS/PCN/L.24, 3 September 1985).

6. To permit more detailed specification of the requirements identified by the United Nations, the International Court of Justice at The Hague, the European Court of Human Rights at Strasbourg and the Court of Justice of the European Communities at Luxembourg provided documentation on their own requirements in terms of space and staff. What emerges above all from this documentation is the extent of the special administrative requirements and expenditure of international courts. Of particular interest in this respect are the more recent planning documents provided by the European Court of Human Rights, which were drawn up in 1985 for the construction of its new office building.

7. On the basis of this documentation, the Federal Ministry of Justice is currently drawing up a fully detailed plan of requirements for the International Tribunal. This plan will be submitted on completion to the relevant divisions of the United Nations Secretariat and to the Preparatory Commission. The comparison between the United Nations documents of February 1981 and the corresponding plans and other documents of the aforementioned international courts has already raised a number of questions, which will be communicated to the Secretariat of the United Nations and the office of Special Commission 4 at the next meeting of the Preparatory Commission, to be held at Kingston, Jamaica, from 30 March to 16 April 1987, so that these matters can be clarified at the meeting or at subsequent talks in New York. The aim of the Federal Government is that by this summer all details of the requirements of the International Tribunal in terms of space and staff, including all technical facilities (library, postal and telecommunication facilities, catering, facilities for the press and visitors, security, etc.) will have been settled in co-ordination with the relevant United Nations bodies, so that the building can be planned on this basis.

8. With regard to the provision of temporary accommodation at Hamburg for the International Tribunal, the communiqué issued by the United Nations following the briefing on the planning situation by the Free and Hanseatic City of Hamburg in New York on 10 and 11 March 1983 stated the following:

> "Meanwhile, if it is required, the City of Hamburg is in a position to offer interim facilities and the necessary buildings for the Tribunal" (United Nations press communiqué of 11 March 1983).

As part of the preparations made by the Federal Government and the Free and Hanseatic City of Hamburg to provide temporary accommodation, if necessary, for the International Tribunal, the United Nations delegation was received during its visit to Hamburg from 11 to 14 September 1984 by the President of the Higher Hanseatic Court of Hamburg. The delegation was shown premises of this court which could be used for public sessions of the International Tribunal until the final premises on the Elbchaussee are completed.

9. In continuation of these preparations, the Free and Hanseatic City of Hamburg has now also identified offices which would serve as suitable temporary accommodation for the International Tribunal until the completion of its own facilities. Should the Tribunal be set up in 1990 or 1991, a building with 13,500 square metres of office space in a prime location close to the city centre (No. 50 Warburgstrasse in Hamburg 13) could be made available. The building, in the immediate vicinity of the Outer Alster, a lake in the heart of Hamburg, was erected in 1973 with stepped storeys and is equipped with movable inner walls, which means that it could be adapted to the needs of the International Tribunal within the shortest possible time. The building is fully suited as temporary alternative housing for the Tribunal on account of:

(a) Its size and equipment (including in particular all modern technical facilities as a result of its present function as a press and publishing office);

(b) Its location in a prominent central residential and commercial district in the immediate vicinity of numerous consulates;

(c) Its public transport facilities and direct access to international air and rail services (open-air and underground car-parking space; underground and railway stations within 600 yards; six miles from the Hamburg airport);

(d) Its technical facilities which cover security requirements.

The technical details and graphic plans of this building can be made available to the Preparatory Commission.

10. The Federal Government plans to invite representatives of the United Nations Secretariat and of the Preparatory Commission to visit Hamburg again. Amongst other things, this would enable these bodies to examine the suitability of the building and to discuss in situ the details of its use by the Tribunal as temporary accommodation.

11. As a result of these efforts, it has already been assured that the International Tribunal will be able to take up its work in the Free and Hanseatic City of Hamburg from the date of its establishment and to have all the space and technical facilities it requires. At the same time, the Federal Government is aware that, according to the introductory note to the draft convention of 28 August 1981 (A/CONF.62/L.78) and section 38 of the Final Act of the Third United Nations Conference on the Law of the Sea, the States envisaged as sites for institutions under the Convention should be Parties to the Convention on the Law of the Sea on its entry into force. The Federal Government hopes, however, that the matters concerning deep-sea mining can be cleared up in such a way as to enable the Federal Republic of Germany, as well as other States with an interest in deep-sea mining, to become Parties before the United Nations Convention on the Law of the Sea enters into force.

12. Irrespective of this question, the Federal Republic of Germany considers itself obliged, on the basis of the decision taken on 24 August 1981 by the Third United Nations Conference on the Law of the Sea designating Hamburg as the seat of

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the International Tribunal for the Law of the Sea (art. 1 (2) of annex VI of the United Nations Convention on the Law of the Sea), to ensure that the Tribunal can take up its work in Hamburg by the earliest possible date. In accordance with this obligation, the Federal Republic of Germany is also willing and able even now to conclude an agreement with the relevant United Nations bodies on the temporary accommodation at Hamburg of the International Tribunal for the Law of the Sea.

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Chairman's Summary of Discussion on the Headquarters Agreement and Related Instruments on Privileges and Immunities

1. During its 43rd to 45th meetings the Special Commission examined issues raised in the working paper on the Headquarters Agreement and related instruments on privileges and immunities (document LOS/PCN/SCN.4/WP.4). In this working paper the Secretariat had identified issues on which it needed guidance from the Special Commission in order to enable it to prepare a draft for a Headquarters Agreement, which is to be taken up by the Special Commission during the summer meetings of the Fifth Session. The issues involved are mainly such as are not provided or not adequately provided for in the existing headquarters agreements and related instruments concluded by the Internaitonal Court of Justice and other international courts. As is known the Law of the Sea Convention envisages access to the International Tribunal for the Law of the Sea not only for States Parties, including intergovernmental organizations referred to in Annex IX of the Convention other Entities referred to in article 305, paragraph 1 of the Convention and other intergovernmental organizations, but also for juridical and natural persons. The Convention makes no provision, however, for the privileges, immunities and facilities to be accorded to the parties to a dispute before the Tribunal.

2. The Special Commission began with an exchange of views on the general principles to be covered in an Headquarters Agreement between the Tribunal and the host country. The members of the Special Commission were agreed that the Secretariat in drawing up those provisions of the Draft Headquarter Agreement which are not covered by the above-mentioned working paper, for which there is, however, applicable precendent in existing headquarters agreements and related instruments, should take guidance from the relevant articles of the headquarters agreement and related instruments concluded by the International Court of Justice and other international courts and by the United Nations Organization and its Specialized Agencies with the respective host countries. This would apply inter alia, to provisions on the headquarters seat, the law and authority in the headquarters seat, the protection of and public services in the headquarters seat, communications and transportation, the property

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of the Tribunal, freedom from taxation, financial facilities, transit and residence, settlement of disputes and provisions concerning the operation of the Headquarters Agreement. In following the above-mentioned precedents account should be taken of recent practice and experience in applying these instruments.

3. The Special Commission has also agreed that apart from the Headquarters Agreement there is a need for the preparation of a multilateral legal instrument which will embody the privileges, immunities and facilities to be accorded to the Tribunal, its officials, to the parties to disputes, those acting on their behalf, witnesses and others who appear before the Tribunal, outside the territory of the Tribunal's host country. This legal instrument should be prepared after the Special Commission has completed its examination of the Draft Headquarters Agreement.

4. Following this exchange of views on general principles the Special Commission considered the working paper section by section.

Members and members ad hoc of the Tribunal

5. As regards the privileges, immunities and facilities to be accorded to the elected members and members ad hoc of the Tribunal, it was pointed out in the discussion that article 19 of the Statute of the International Court of Justice and article 10 of the Statute of the International Tribunal for the Law of the Sea are identically worded. They provide that the members of the Tribunal and the judges of the International Court of Justice, respectively, when engaged in the business of the Tribunal or the Court, shall enjoy diplomatic privileges and immunities. The Special Commission has therefore agreed that the Secretariat in preparing the draft articles on the members and member ad hoc of the Tribunal should follow the relevant provisions of the agreement concluded between the International Court of Justice and the Government of the Netherlands on 26 June 1946. It is laid down in that agreement as well as in the relevant provisions of Resolution 90 adopted at the first session of the UN General Assembly that the members of the Court will, in a general way, be accorded the same treatment as heads of diplomatic missions. The provisions of the agreement between the International Court of Justice and the Government of the Netherlands should serve as precedents also with regard to the privileges, immunities and facilities to be accorded to the members of the families and of the households of the members and members ad hoc of the Tribunal.

6. Some delegations noted that since the conclusion of the above-mentioned agreement in June 1946 and the adoption of Resolution 90, the rules of international law on diplomatic privileges, immunities and facilities have been progressively developed. In particular, the Vienna Convention on Diplomatic Relations of 1961, to which in the meantime more than 150 States have become parties, contains precise provisions on this issue, which have stood their test in practice. It was pointed out, therefore, that in drafting the provisions concerning the privileges, immunities and facilities of the members of the Tribunal, the Secretariat should also take account of the regulations made in that Convention.

7. In accordance with the practice of the International Court of Justice, members ad hoc of the Tribunal should be accorded the same privileges, immunities and facilities as were accorded elected members of the Tribunal. Moreover, there was general agreement in the Special Commission that these privileges, immunities and facilities should continue to be granted to the members of the Tribunal even after

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the expiration of their terms of office if they continued to exercise their functions in respect of a particular case. As regards acts done and words spoken or written in the exercise of their functions, the immunities would be continuing even thereafter.

Experts appointed under article 289 of the Convention

8. In connection with the functional privileges, immunities and facilities to be accorded to Experts appointed under article 289 of the Convention, the Secretariat in formulating these provisions should be guided by the relevant regulations for assessors of the International Court of Justice. With regard to assessors the agreement between the International Court of Justice and the Government of the Netherlands makes reference to article IV, section 22 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946. There the principle is established that this category of persons shall be accorded such privileges and immunities as are necessary for the inadependent exercise of their functions. This is followed by a listing of the various privileges and immunities.

9. The Secretariat was requested to examine carefully whether all privileges and immunities listed there for assessors to the Court are also required for experts under article 289 of the Law of the Sea Convention. Some delegations doubted, for instance, that it was necessary to give experts under article 289 of the Convention the right to use codes or to receive papers or correspondence by courier or in sealed bags for the purposes of their communications as provided for in Section 22(d), article VI of the above-mentioned Convention on Privileges and Immunities. However, other delegation were in favour of granting them the same treatment as given to assessors in the International Court of Justice.

Parties to a dispute and their agents, counsels and advocates

10. There was general agreement to the effect that the parties to a dispute and the agents, counsel and advocates representing them before the Tribunal should enjoy the privileges and immunities necessary for the independent exercise of their function. For this purpose, it was suggested that the practice before international courts which provide access to natural or juridical persons should be considered.

11. The privileges, immunities and facilities to be accorded to the parties to a dispute and those acting on their behalf should include in particular:

- freedom of access to and from the Tribunal;

- the entitlement to reside temporarily in the host country, i.e. while the case is proceeding;

- immunity from legal process in the course of the exercise of their functions;

- immunity in respect of words spoken or written and acts done by them in the course of the performance of their functions. This immunity should continue to be accorded even after the proceedings before the Tribunal are completed.

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- inviolability of all papers and document;

- free and unimpeded communication in all matters relating to the exercise of their functions before the Tribunal;

- entitlement to such allocation of foreign currency as may be necessary for the performance of their functions.

12. These privileges, immunities and facilities were considered to be the minimum required and should be accorded to all parties to a dispute and those acting on their behalf. The fact that representatives of States Parties, under generally accepted rules and norms of international law and multilateral conventions such as the Conventon on Diplomatic Relations, are normally accorded wider rights and privileges, does not entitle entities other than States Parties and their representatives to demand from the host country the same privileges and immunities as are accorded to representatives of sovereign States or intergovernmental organizations comtemplated in Annex IX in Annex IX of the Convention.

13. It was pointed out in the discussion that the principle under which the parties to a dispute should be treated equally in all respects would not mean that States or intergovernmental organizations would have to forego their rights as subjects of international law or that entities other than States Parties would have to be treated as subjects of international law where proceedings before the Tribunal are concerned.

Witnesses and experts who testify on behalf of a party or at an instance of the Tribunal

14. There has been agreement in the Special Commisison to the effect that witnesses and experts should be accorded the privileges, immunities and facilities necessary for the performance of their duties. In this connection attention was drawn to the relevant provisions applicable to witnesses and experts before the International Court of Justice.

15. Some delegations noted that it might be necessary to differentiate between witnesses and experts performing missions by order of the Tribunal as provided for in article 72(2) or 77(1) of the Revised Draft Rules of the Tribunal, and witnesses and experts testifying on behalf of the parties to a dispute.

16. It was proposed that only after the list provided for in article 67 of the Revised Draft Rules of the Tribunal has been communicated to the Tribunal should the witnesses and experts whom a party intends to call be accorded the contemplated privileges and immunites.

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The Registrar, the officials and staff of the Registry

17 There was agreement in the Special Commission that the Registrar and the Deputy Registrar or other official when acting for the Registrar, should be accorded the same privileges, immunities and facilities as members of the Tribunal.

18. Functional privileges, immunities and facilities would be required for the staff of the Registry, depending on their status and the responsibilities entrusted to them. The proposal was made that the relevant practice of the International Court of Justice should be followed also in respect of the staff of the Registry.

19. Nationals of the host country employed with the Tribunal should in accordance with international practice only enjoy immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions.

20. The Special Commission has agreed that it is not the purpose of privileges, immunities and facilities to benefit individuals but to ensure the efficient performance of the functions of the Tribunal.

21. As regards the question of the waiver of immunity it was suggested that as concerns the staff of the Registry, the Registrar, perhaps with the President's approval, may withdraw their immunities, with due regard to the principle laid down in the previous paragraph. In the case of the Registrar, this duty could rest with the Tribunal.

22. It is not possible in this summary to reflect each and every suggestion made in the course of the debate. The Secretariat does, however, maintain a complete record of all suggestions. They will be taken into account in preparing the Draft for an Headquarters Agreement to be concluded between the Tribunal and the host country.

23. The Chairman would appreciate being appraised of any matter of consequence not relfected in this summary.

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CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Revised draft Rules of the International Tribunal for the Law of the Sea

1. The Special Commission, on the recommendation of its Bureau, decided that in the consideration of the second part of the revised draft Rules of the Tribunal contained in document LOS/PCN/SCN.4/WP.2/Rev.1 (Part II) it should again employ a method of work that would ensure an expeditious examination focused on the substantive problems while excluding a resumption of the discussion on matters on which agreement had been reached during the earlier examination of the draft rules. The Special Commission further decided that the examination of the revised draft Rules would be carried out section by section or, where they were divided into subsections, subsection by subsection.

2. The Special Commission approved the suggestion of the Chairman that in its examination of the revised text the same method of work should be employed which had proved effective during the consideration of Part I of the revised draft Rules, namely:

(a) The discussion should focus on those rules that are new and were formulated as a result of a general discussion on the subject by the Special Commission;

(b) Proposals of a drafting nature intended to clarify the text without affecting the substance, or for harmonization of the different languages, should be brought to the attention of the Secretariat in writing at the end of each meeting;

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(c) Changes of a substantive nature should only be proposed if the draft article is found to be seriously deficient and unacceptable and if the changes proposed are likely to achieve the widespread approval of the Special Commission.

3. Prior to the consideration of each section or subsection, the Secretary of the Special Commission outlined in what respects the revised text differed from the one contained in document LOS/PCN/SCN.4/WP.2, the rationale for the change as evinced from the discussions and the implications of the revised provisions.

Part IV. Proceedings in disputes

Section D. Incidental proceedings (continued) [1]

Subsection 3. Preliminary proceedings

Article 94

4. In introducing this subsection the Secretary pointed out that it relates to article 294 of the Convention and that there is no precedent for such preliminary proceedings in the practice of the International Court of Justice.

5. He explained that the provisions of article 94 in the revised draft Rules, in comparison with the wording of article 89 of the original text (document LOS/PCN/SCN.4/WP.2), had been elaborated with more detail and that, in particular, paragraphs 2 to 6 and 8 had been added.

6. The discussion focused on the time-limit of two weeks (as referred to in paragraph 2) within which the respondent party or parties may request the Tribunal to determine whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. Several delegations expressed the view that more flexibility should be given to the Tribunal in fixing that time-limit. It was argued in that connection that the time-limit of two weeks could create practical problems for the parties to the dispute. Some delegations proposed that the time-limit of two weeks should not begin to run from the date of receipt of the application by the Tribunal, but only from the time the other party or parties had received notification that an application had been made under article 94 (1). Other delegations proposed to leave the fixing of the time-limit to the discretion of the Tribunal and to use a formulation such as that in article 294 of the Convention, which refers to a "reasonable time-limit". Some delegations considered article 58 of the Rules as being adequate for this purpose.

7. Some delegations felt that there was a need for the parties to a dispute to be notified of an order as mentioned in paragraph 7. Others pointed out that the

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[1] The Chairman's summary of discussions concerning parts I-III and part IV, sections A-C as well as section D, subsections 1 and 2, are contained in documents LOS/PCN/SCN.4/L.7 and LOS/PCN/SCN.4/L.7/Add.1.

paragraph was so formulated that this was implied. Finally, there was a general understanding to include in this paragraph a reference to the requirement that the Registrar notify the parties to a dispute of the determinations and orders made by the Tribunal or the chambers under this rule.

8. One delegation suggested that it was not necessary to state that no further action would be taken in the case since, if the determination was that the claim was not well founded or constituted an abuse of legal process, then that would be the effect of removing it from the General List. Another delegation saw a need for specifying the nature of "further proceedings" mentioned in paragraph 8.

Subsection 4. Preliminary objections

Article 95

9. In introducing this subsection the Secretary pointed out that this provision follows the corresponding provision of the ICJ Rules. During the first reading only a few changes were proposed concerning this provision. They had been taken into account in the revision.

10. Some delegations asked why in article 94 (7) it is laid down that in connection with preliminary proceedings the Tribunal shall make its determination in the form of an order, while article 95 (7) says that in proceedings relating to preliminary objections the Tribunal shall give its decision in the form of a judgment.

11. Replying to this question the Secretary said that article 94 was derived from article 294 of the Convention, which had no precedents in the ICJ Rules. Unlike this, article 95 closely follows the corresponding article 79 of the ICJ Rules. It was also pointed out that article 94 relates to the abuse of legal process and does not deal with the merits of a case, does not constitue a final judgment, and is no more than a procedural bar to further proceedings. It was therefore appropriate for the Tribunal to make a determination in the form of an order. By contrast, article 95 covered situations in which the Tribunal was called upon to deal with disputes over its own jurisdiction which are decided in the form of a judgment.

12. Some delegations considered it adequate to refer, in article 95 (2) and (3), to "copies" rather than "certified copies". Alternatively, it should be indicated as to who is to certify the copies.

Subsection 5. Counter-claims

Article 96

13. No substantive amendments were made concerning this subsection. Several delegations saw a need for harmonization between the French, Russian and English texts.

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Subsection 6. Intervention

Articles 97-102

14. In introducing this subsection the Secretary pointed out that the revision specified, among other things, that intervention under article 31 of the Statute was restricted to States Parties alone. However, under article 32 of the Statute, not only States Parties but also entities other than States, referred to in article 291, paragraph 2, of the Convention, would have the right to intervene. Corresponding adjustments have been made to the articles elaborating on article 32 of the Statute.

15. In the discussion, several delegations supported this approach. Delegations pointed out that the clear language of article 31 of the Statute grants the right of intervention exclusively to States Parties to the Convention and that the corresponding articles of the Rules should conform to that requirement. In the case of intervention under article 32 of the Statute, it was considered necessary to bring the articles of the Rules elaborating that provision in line with the relevant provisions of article 291, paragraph 2, of the Convention and articles 20.2 and 32 of the Statute, which permitted entities other than State the right to participate. On the basis of these arguments, it was suggested that article 100, paragraph 2, should specify in what cases a State Party may seek to intervene and in what cases an entity other than a State may do so. Consequently, in article 101, paragraph 1, it was suggested that the reference to "entity other than a State" should be deleted.

16. In this context, the view was expressed that intervention should not be allowed beyond the stage of closure of written proceedings. However, this view was opposed.

Article 97

17. It was suggested that in article 97.2 (c) the reference should be to States Parties rather than States. In relation to the exceptional circumstances referred to in paragraph 1, and a later stage referred to in article 98, paragraph 1, it was proposed that those circumstances and the stage should be specified. Otherwise a wide-ranging interpretation of these formulations, and thus their abuse leading to an unwarranted extension of proceedings, could not be ruled out. One delegation felt, however, that the terms mentioned gave the Tribunal the discretion it needed for its decisions and the present text should therefore be retained, all the more so since they had been derived from the corresponding Rules of the International Court of Justice.

Article 98

18. Article 98, paragraph 2, was commented on, it being suggested that not only the name of the agent but also the address should be required. In paragraph 2 (b) and (c) and paragraph 3, the reference to "construction" in relation to an international agreement was not considered appropriate, and there was support for the view that it should be replaced by the words "interpretation or application".

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Article 100

19. One delegation opposed the provision of article 100 (1) according to which the Tribunal shall decide on applications for permission to intervene under articles 31 and 32 as a matter of priority since there was no provision to this effect in the Convention. It was explained that the Special Commission had already discussed the priorities to be observed by the Tribunal in its work, and the list of priority situations should not be added to. Another view was that if a priority was set in article 100 of the revised draft Rules, it must not be considered as an absolute priority over other cases before the Tribunal but only a priority in the context of the case.

Article 102

20. There was a general trend of thought that in article 102, paragraph 1, the reference to an intervening State should be clarified as being to an "intervening State Party" and the other entities referred to therein should be referred to as "entity other than a State Party". Similar changes were required in paragraph 2 of this article.

Subsection 7. Special reference to the Tribunal

Article 103

21. Some delegations were of the opinion that this subsection, which consists of article 103, was superfluous and inappropriate since the appellate procedure it provides for may be seen as running counter to the principle of the finality and binding force of decisions of international courts or tribunals under the Convention. There was no foundation in the Convention for article 103. It should therefore be deleted. Other delegations were of the view that the appellate procedure envisaged in this article should be applicable in cases where disputes related to the Law of the Sea Convention are involved and where all parties to the dispute concerned agreed in advance by special agreement on such an appellate procedure. These delegations pointed out in this connection that annexes VII and VIII of the Convention, which deal with arbitration and special arbitration, provide for appellate procedures.

22. It was suggested that, in the second paragraph of this article, reference should be made not only to decisions of courts or tribunals, but also to other acts of such bodies.

Subsection 8. Discontinuance

Articles 104 and 105

23. A number of delegations saw a need for harmonizing the French text of the articles forming this subsection with the corresponding articles 88 and 89 of the Rules of the International Court of Justice.

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24. It was also proposed that in article 104 (2) the word "may" should be replaced by "shall". The view was also expressed that the Tribunal should indicate the terms of the settlement in the order for the removal of the case from the General List.

Section E. Proceedings before the Chambers

Articles 106-108

25. In introducing this section the Secretary explained that in the course of the revision the various articles had been brought more into line with articles 17 (4) and 25 (2) of the Statute of the Tribunal.

26. Several delegations preferred to have this section titled "Proceedings before the Special Chambers" on the grounds that proceedings before the Sea-Bed Disputes Chamber were dealt with in Part V of the revised draft Rules.

27. The Special Commission agreed to delete, in article 106, the reference to article 14 of the Statute and to confine this section to Special Chambers referred to in article 15 of the Statute. If necessary, a corresponding provision could be included in Part V of the Rules to cover the Sea-Bed Disputes Chamber referred to in article 14 of the Statute. It was also agreed that the reference to applicable rules that would govern the Special Chamber would not only be those contained in Parts I and III but also the preceding sections A to D of Part IV.

28. At the suggestion of various delegations, the Special Commission agreed that article 107 of the revised draft Rules should also deal with the ad hoc special chamber provided for in article 15 (2) of the Statute. In such cases, where an application is made to form such a chamber, the request should be contained in the document instituting the proceedings or accompanying it. If the parties were in agreement, the request should be given effect. The composition of such chamber would be determined by the Tribunal with the agreement of the parties. Such a provision could be incorporated in paragraph 1 or could constitute a new paragraph to be inserted between paragraphs 2 and 3.

29. The Special Commission accepted the suggestion that article 107 (4) should form a separate article since it dealt with a specific procedure and was different from the subject-matter of the rest of the article.

Section F. Judgments, interpretation and revision

Subsection 1. Judgments

Articles 109-112

30. In introducing this subsection, the Secretary drew attention to the fact that the present article 109 was patterned on former articles 104 and 105 (document LOS/PCN/SCN.4/WP.2 of 27 July 1984). In particular, he indicated that in the

second paragraph, a formulation had been included for judgments to be read without constituting the whole Bench that heard the case, since it might be advantageous to do so. This proposal did not arise in the discussions of the Special Commission, but had been based on the practice of other international tribunals, in particular the European Court of Human Rights. Attention was also drawn to changes to articles 110, which lists the elements that must be contained in a judgment. In the earlier version of this provision a judgment was to contain "the reasons in point of law" (cf. article 106 (1) in WP.2 of 27 July 1984). Reference is now made to the reasons on which the judgment is based "including the reasons in point of law" to ensure that all reasons are covered.

31. The Secretary explained that in the discussion of the original draft, in accordance with the request of several delegations, paragraph 2 of article 110 was made more specific in line with the relevant provisions of article 30 (3) of the Statute, in that it now states that any Member or Member ad hoc of the Tribunal is entitled to attach his individual opinion to the judgment. It has also been made clear in the third paragraph that what is meant is a case submitted under an agreement pursuant to article 20, paragraph 2, article 21 or article 22 of the Statute.

32. Several delegations commented on article 109 (1), under which the parties shall be notified by the Tribunal or a chamber within a reasonable time of the date on which the judgment will be read. In that view, this notice should be given immediately or as soon as possible, while it is the reading of the judgment that shall take place within a reasonable time.

33. With regard to article 109 (2), the question was raised as to whether it was justified that in cases where the judgment is to be rendered as a matter of urgency, or if the Tribunal otherwise considers it expedient, for the President or Acting President to read the judgment at a public sitting at which all Members and Members ad hoc constituting the bench for the case may not be present. With reference to article 30 of the Statute and the corresponding article 94 of the Rules of the International Court of Justice, neither of which makes special provision for cases of urgency, one delegation had reservations about the present wording of article 109 (2), arguing that there was no legal basis for such a rule. However, other delegations welcomed the idea that this paragraph took special account of the cases of urgency and opposed substantive changes. The Secretary pointed out that this was based on Rule 51 of the European Court of Human Rights.

34. The Special Commission agreed that in the second sentence of paragraph 2, in addition to the reference to the Tribunal, the chamber should also be mentioned just as in the first sentence.

35. Article 110 (1) lists the elements which a judgment shall contain. It was proposed that for the sake of greater clarity the elements listed should be numbered. It was proposed and was generally found acceptable that the reference to "the reasons on which the judgment is based, including the reasons in point of law" should be reformulated by referring not only to the inclusion of reasons in point of law but to the reasons in fact as well. It was also proposed that reference to the names of the Members constituting the majority reflected in the judgment should

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be added to and that the names of the minority should also be included. This suggestion was based on the practice of the International Court of Justice in the Gulf of Maine case. It appeared to have broad support within the Commission.

36. Article 110 (2) of the draft Rules deals with the right of any Member or Member ad hoc of the Tribunal to attach an individual opinion to the judgment. In addition, it permits a Member or a Member ad hoc to record his concurrence or dissent, without reasons, in a declaration. Against this background the Special Commission discussed the question as to whether there was a need to provide for a right to an individual opinion, even in cases where a member of the Tribunal concurred with the majority. It was felt in this connection that, for example, there might be cases where members agreed with the judgment but did not agree with the reasons on which it was based. It was proposed by one delegation that this paragraph should be supplemented by article 30 (3) of the Statute. Another suggestion was that Rule 95 of the Rules of the International Court of Justice should also be followed. The reference to an "individual" opinion was also commented upon. One delegation preferred to make reference to a "separate" opinion, while another felt that the reference should be to a "separate or dissenting" opinion. Another view was that the paragraph should be left in its present form. With respect to the question of individual opinions being given in a declaration even when they were in concurrence with the majority, one delegation pointed out that this was a device frequently resorted to in order to ensure that that Member's name appeared at the start of the judgment. It is to prevent such a practice that the earlier suggestion was made concerning the first paragraph, wherein not only the names of the majority but also those of the minority should be included in the formal part of the judgment.

37. There was a further suggestion made in respect of paragraph 2 that in addition to referring to the Tribunal reference should also be made to its chambers since the same practice should be followed by the chambers as well.

38. In the course of the consideration of article 111, which deals with the delivery of the judgment in one of the Tribunal's official languages, the suggestion was made to delete article 61 (2) of the draft Rules since there was duplication between that and the present article. This proposal was not opposed.

39. In commenting on article 112, again one delegation felt that in referring to the Tribunal a reference should also be made to the "chambers", and similarly in articles 109 (2) and 110 (2). This was supported since the question of judgments applied not only to the Tribunal itself, but also to its chambers.

40. One delegation was of the view that part IV of the draft Rules could be better structured by moving the entire section F to the end of part IV, i.e., it should appear after section G, which deals with modifications of the Rules proposed by the parties.

Subsection 2. Requests for the interpretation or revision of a judgment

Articles 113-116

41. In introducing this subsection the Secretary pointed out that, consistent with the trend of the discussion during the first reading of the draft rules, the term "decision" had been replaced by "judgment" to the extent that the context permitted. Recognizing that the practice of the International Court of Justice and the requirements of the Tribunal Statute should also be taken into account, attention was drawn to the fact that the present articles 114 and 115 were a combination of the former articles 110 and 111 (cf. WP.2 of 27 July 1984).

42. In response to a question from one delegation, the Secretary stated that in accordance with article 15 (5) of the Statute this subsection would also apply to requests for the interpretation or revision of a judgment of the Sea-Bed Disputes Chamber.

43. During the discussion of article 113, which deals with the treatment of a request for the interpretation of a judgment, it was suggested to fix a time-limit beyond which a request for the interpretation should no longer be admissible. Otherwise there was a risk that the possibility of making such requests pursuant to article 113 could be abused to delay the enforcement of a judgment. Other delegations felt however that such a time-limit for requests of this sort would be superfluous or even harmful. One delegation questioned the need for the final phrase of the paragraph, which indicated that a request for interpretation would be made in the same manner whether the original proceedings were begun by application or by notification of a special agreement. It was explained by the Secretary that if the practice of other international courts is taken into account, then an application for interpretation or revision may not be entertained, where the case had been submitted by notification of special agreement. The request for interpretation or revision would, in such case, also have to be by special agreement, it being argued that in such an event the request for interpretation or revision should be made in the same manner as the original submission of the dispute.

44. With reference to what the Secretary had pointed out in introducing this subsection, one delegation saw a need for the term "judgment" to be used throughout article 113 (2). The delegation was of the view that the term "decision" in the last line of paragraph 2 was inappropriate since it referred to the same content that was previously termed "judgment".

45. Paragraph 3 of article 113 provides, among other things, that following a request for interpretation by one party the other party would be entitled to file written observations within a time-limit fixed by the Tribunal. To ensure that the other party would be apprised of the request for interpretation, the proposal was made that the Tribunal, after receiving the application for interpretation, should notify the other party that such a request had been received. The Tribunal should also notify the party of the time-limit for submitting a reply. It was suggested that this time-limit might be 60 days. Other delegations preferred the present

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wording of paragraph 3 for the reason that it closely followed the corresponding provisions in the Rules of the International Court of Justice (article 98 (3)).

46. Several delegations wanted paragraph 1 of article 114 to be more specific as regards the nature of the new facts that enable a request for revision of a judgment to be made. These delegations suggested a further elaboration of the nature of the facts that could give rise to the revision of a judgment. In that view, the fact should be such as would materially affect the validity or basis on which the judgment was given, which fact is of such a nature as to be a decisive factor. A further suggestion was that the party requesting revision should establish that the ignorance of the fact was not due to negligence.

47. With reference to article 114, paragraph 4, one delegation suggested that the 10-year period envisaged in that paragraph was too long, especially where it applied to judgments of the Sea-Bed Disputes Chamber. Such a long time-limit might give rise to legal insecurity. Another delegation felt that the time-limit of 6 months referred to in paragraph 3 would be adequate for the purposes referred to in paragraph 4, and that paragraph 3 would thus become superfluous. However, the prevailing view in the Special Commission was that paragraphs 3 and 4 dealt with different situations requiring different time-limits, and favoured keeping the time-limits as currently fixed in the draft, which corresponded with the relevant provisions of article 61 of the Statute of the International Court of Justice. Also, one delegation suggested that the time-limit for the "discovery of the new fact" fixed in paragraph 3 should be determined according to objective criteria in order to make sure that the requesting party could not manipulate this time-limit in its interest.

48. Concerning article 115, paragraph 1, the view was expressed that the application referred to was an application for revision and not for interpretation, and that this should be clarified. Another view was that the discretion given to the Tribunal to afford the parties the further opportunity of presenting their views should be taken away and it should be mandatory to afford the parties such an opportunity, and while the party should not be obliged to do so, it could present views if it so desired.

49. With respect to paragraph 2 of article 115, the question was raised as to why the decision to entertain the application for revision should be in the form of a judgment. The explanation was that entertaining the application for revision implied a review of the original judgment and thus such a decision could not be in the form of an order but should itself be in the form of a judgment.

50. The formulation in paragraph 3 of article 115 was considered by some delegations to require clarification. This was especially so in relation to the opening words "when appropriate". The consequences of it being considered appropriate were contained in the second sentence of that paragraph. However, this concern was not shared by others. As regards the requirement of previous compliance that is referred to in the second sentence, it was thought necessary to give the parties an opportunity to present their views on such compliance before a decision was made.

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Section G. Modifications proposed by the parties

Article 117

51. There were no comments on this section.

Part V. The Sea-Bed Disputes Chamber

Section A. Members, Members ad hoc and experts of the Chamber

Subsection 1. The Members and Members ad hoc of the Chamber

Articles 118-120

52. In discussing this subsection the Special Commission focused its attention on article 118. It was suggested that rather than indicating that the Tribunal should take into account the requirements of the Statute, the language should more closely follow the Statute itself and require the Tribunal to assure the representation of the principal legal systems and equitable geographical distribution in the selection of the Members of the Chamber.

53. One delegation proposed that in paragraph 3 of article 118 the word "also" should be deleted.

54. A number of delegations made reference to paragraph 4 of article 118, which defines the term "Member ad hoc of the Chamber". Since in substance this provision is identical with article 1 (8) of the revised draft Rules, it was suggested to delete paragraph 4 of article 118.

55. In article 120, paragraph 4, it was suggested that, in the second line, clear reference should be made to paragraphs 1, 3 and 4 of article 4 and article 120, paragraph 2, of the Rules.

Subsection 2. Members ad hoc

Article 121

56. There were no comments on this subsection, except that in the second paragraph it was suggested that the reference should be to "declaration" rather than "declarations".

Subsection 3. Experts

Article 122

57. One delegation proposed with regard to article 122 (1) that instead of saying that the powers with respect to the appointment of experts shall "belong" to the

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Chamber, it should say that they will be "vested" in the Chamber. Another delegation suggested that the word "also" should be interpolated between the words "shall" and "belong to the Chamber". In the second paragraph, rather than referring to "experts before the Chamber", it was suggested that the reference should be to "experts of the Chamber". This appeared to attract wide support. Another suggestion merely to refer to "experts" without further qualification did not attract support.

58. Some delegations were of the opinion that the provision of article 122 (2) concerning the declaration to be made in connection with the responsibilities referred to in article 10, paragraph 6, was inadequate since the present wording did not ensure that all responsibilities referred to in article 10 (6) were covered. Therefore, there was to be an explicit reference to all responsibilities of the experts under article 10 (6). Another point of view was that a mere reference to the article was adequate without further description of the content of that article.

Section B. The Presidency of the Sea-Bed Disputes Chamber

Article 123

59. No comments were made on this section.

Section C. Proceedings before the Sea-Bed Disputes Chamber

Subsection 1. Proceedings

Articles 124-127

60. In introducing this subsection the Secretary drew attention to the fact that in revising article 124 the requirements of an application under article 20 (2) of the Statute submitted by an entity which is not a State Party were specified. In working out this provision the Secretariat had taken guidance from rule 38 (5) of the Court of the European Economic Community. The time-limit fixed in article 124 (9) was changed, in line with a proposal made in the discussion of the original draft, from one month to two months. Article 126 was added to the revised draft Rules.

61. Concerning article 124, one delegation suggested regrouping the paragraphs, with paragraphs 1 and 2, 3 to 7 forming one article and paragraphs 8 to 10 forming a separate article.

62. As for article 124 (3), several delegations felt that the role of the sponsoring State in proceedings before the Sea-Bed Disputes Chamber should be worded more clearly. Attention was drawn to the need of following closely the basic provision of article 190 of the Convention. The current wording of article 123 (3) of the revised draft Rules did not reveal whether the sponsoring State will appear as a party to the dispute pursuant to article 187 of the

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Convention or with an independent status. In that view, sponsoring States should have the right to participate in the proceedings and the opportunity to file statements.

63. With respect to paragraph 6 of article 124, it was suggested that the content should be made applicable to both natural and juridical persons. With respect to subparagraph (b) of that paragraph, rather than referring to the "proof of the authorization granted", it was suggested that it should be refer to "proof that authorization had been granted".

64. With respect to article 125, some delegations commented that under paragraph 4 no fresh issue might be raised in the course of proceedings unless it was based on matters of law or of fact which came to light in the course of the written proceedings. The proposal was made to delete this provision since it was not clear what was to be understood by a "fresh issue". However, other delegations were in favour of keeping the provision. One delegation proposed that this possibility should be extended explicitly to include oral proceedings.

65. To improve the structure of the present article 125, one delegation was of the view that paragraphs 3 to 6 should be taken out of this article and grouped in a separate article.

66. When article 126 came under consideration the opinion was expressed that this provision was already reflected in the second sentence of article 16 of the draft Rules and could therefore be deleted. Moreover, the relevant sentence of article 16 could be moved to section C of Part IV.

67. One delegation suggested the deletion of article 127 (3) on the ground that its substance was already covered by paragraph 2 of that article. Other delegations favoured keeping article 127 as currently worded.

Subsection 2. Special reference to the Sea-Bed Disputes Chamber

Article 128

68. The Secretary explained that this subsection is new in the draft Rules in order to meet the requirements of article 188 of the Convention.

69. In discussing the new subsection one proposal was to make reference in paragraph 1 to "relevant provisions of the Convention, the Statute or these rules", and not merely to "the provisions, Statute or rules". On the suggestion of one delegation, it was generally understood that there should be more detailed provisions included to deal with such questions as the participation of parties in such proceedings and how they would do so, etc.

70. In the course of the examination of the revised draft Rules, a number of other proposals of a drafting nature were made which were submitted to the Secretariat in writing. They involved suggestions to bring the text of one language in line with the texts of the other languages and proposals designed to make the wording clearer

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without affecting the substance in any manner. Since the present paper is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and they will be taken into account in preparing the second revision of the text. Should any delegation feel that an important matter has been omitted, the Chairman would appreciate being so informed.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Kingston, Jamaica
14 March-8 April 1988

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Revised draft Rules of the International Tribunal for the Law of the Sea

1. In continuing the consideration of the revised draft Rules of the Tribunal contained in document LOS/PCN/SCN.4/WP.2/Rev.1 (Part II), the Special Commission employed the same method of work that had proved effective during the examination of the previous articles of the revised draft Rules. That method called for:

(a) The discussion to be focused on substantive problems while excluding a resumption of the discussion on matters on which agreement had been reached during the earlier examination of the draft rules;

(b) Proposals of a drafting nature and for the harmonization of the different languages to be brought to the attention of the Secretariat in writing at the end of each meeting;

(c) Changes of a substantive nature to be proposed only if the draft article is found to be seriously deficient and unacceptable and if the change proposed is likely to achieve widespread approval of the Special Commission.

2. Prior to the consideration of each section, the Secretary of the Special Commission outlined in what respects the revised text differed from that contained in document LOS/PCN/SCN.4/WP.2, the rationale for the change as evinced from the discussions and the implications of the provisions.

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Part V. The Sea-Bed Disputes Chamber

Section D. Ad hoc chambers of the Sea-Bed Disputes Chamber [1]

Article 129

3. This provision is based on article 36 (Ad hoc chambers) of the Statute of the International Tribunal for the Law of the Sea.

4. The discussion focused on paragraph 2, dealing with the appointment of Members of the ad hoc chamber. Several representatives were of the view that the substance of article 36 of the Statute was not adequately reflected in article 129 (2). Article 36, paragraph 2, provides that if the parties disagree or any party fails to make an appointment the President of the Sea-Bed Disputes Chamber shall promptly make the appointment or appointments. Deviating from this rule, article 129 (2) of the revised draft Rules on the other hand states that the President of the Sea-Bed Disputes Chamber, after consultations with the parties, shall promptly make the appointments if the parties fail to agree on the composition of the ad hoc chamber or to make nominations within the time-limits to be determined by the President. Article 129 (2) therefore did not provide for a situation where one party to a dispute nominates a member of the ad hoc chamber while the other party fails to do so. In such a case the President then appoints a member. This situation should be provided for. It was also suggested that a new second sentence should be included in paragraph 2 to the effect that the President shall set a time-limit within which the parties should appoint an ad hoc member and only if they fail to do so could the President appoint an ad hoc member.

5. It was further suggested that the wording of article 129 (2), which uses both terminologies "appointment" and "nomination", should be brought into harmony with article 36 (2) of the Statute which uses the terminology "appointment" only. The Secretariat was requested to make this change wherever necessary.

Section E. Notification for enforcement

Article 130

6. It was proposed that, in transmitting a judgment to the Government of a State party in whose territory the enforcement is sought, the copy of that judgment must be duly certified.

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[1] Chairman's summaries of discussions on parts I-IV and part V (sects. A-C) are contained in documents LOS/PCN/SCN.4/L.7, LOS/PCN/SCN.4/L.7/Add.1 and LOS/PCN/SCN.4/L.9 and Add.1.

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Part VI. Advisory proceedings

Article 131

7. With reference to paragraph 1 of this article under which, among other things, the Sea-Bed Disputes Chamber exercises its advisory functions under article 91 of the Convention, the suggestion was made that it be specified that advisory opinions were given also on the basis of a request under article 159 (10) of the Convention. It was argued that the functions of the Sea-Bed Disputes Chamber under article 159 (10) and article 191 of the Convention were at par, i.e., contrary to what the present wording of article 131 (1) of the revised draft Rules might suggest, the function under article 191 of the Convention was not to be rated higher than the function under article 159 (10).

8. Several representatives felt that there was a need for the harmonization of the French and Russian versions of article 131 with the English text.

Article 132

9. A number of representatives argued that article 132 (1) as currently worded could give rise to the impression that the Secretary-General of the Authority was authorized to request advisory opinions. The provisions of articles 159 (10) and 191 of the Convention made it clear that only the Assembly or the Council have the power to address such a request to the Sea-Bed Disputes Chamber.

10. During the first reading of the draft Rules on this matter (see LOS/PCN/SCN.4/L.5, p. 9, art. 127), the view was also expressed that this provision should be formulated in clearer terms to preclude such misinterpretation.

11. One representative proposed the rewording of article 131 (1) to make it clear that this article was also applicable to requests made under article 159 (10) of the Convention.

Article 133

12. In the discussion on this article several representatives reaffirmed a view already expressed during the first reading, i.e. that in a contentious case between the Authority and another party equal treatment of the two parties must be assured and that the Assembly or the Council should not be authorized to request an advisory opinion under the provisions of the Convention since the other party has no such right (see LOS/PCN/SCN.4/L.5, p. 9, art. 126).

13. Other representatives raised the question as to whether the Authority may request an advisory opinion of a legal nature in a contentious case where it is not party to the dispute. Some however still believed that even in such contentious cases the Authority should not be permitted to request an advisory opinion. They therefore suggested that the last phrase of this draft article, "between the Authority and another Party", be deleted. Others, in opposing this deletion, referred to article 191 of the Convention which permits advisory opinions on legal questions within the scope of the activities of the Assembly or the Council. One representative suggested that the present wording of article 133 should be amended

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so that it would not be mandatory for the Assembly or the Council not to request an advisory opinion on matters which are already under consideration in a contentious case. It was proposed that the rule should be advisory or in the form of a recommendation and not a prohibition.

Article 134

14. During the discussion of this provision, attention was drawn to the fact that under article 159 (10) of the Convention only the Assembly may request an advisory opinion from the Chamber. It was therefore suggested and agreed that the reference to the Council of the Sea-Bed Authority in the first line of article 134 should be deleted.

15. The proposal was also made to redraft the beginning of this article in order to make it quite clear that not only requests made under article 159 (10) but also those made under article 191 of the Convention should be dealt with as a matter of urgency. It was also suggested that the words "in accordance with" in the second line should be replaced by the words "made pursuant to".

Article 135

16. This article provides that the Registrar shall forthwith give notice of a request for an advisory opinion to States parties and international organizations.

17. One representative suggested that with reference to article 135 (1), the Registrar, while notifying States parties of a request for an advisory opinion, should at the same time communicate the time-limit within which any State party may present a written statement or be heard on the question upon which the advisory opinion has been sought. Other delegations pointed out that this would delay the notification to States parties since the Registrar would have to wait for the Chamber to make such a decision before notifying the States parties.

18. It was suggested by one representative that paragraph 3 be divided, with the last sentence becoming new paragraph 4. Another suggestion was made for the words "the Chamber or, should it not be sitting, by the President of the Chamber" to be replaced by the words "the Chamber or its President, if the Chamber is not sitting".

19. Some representatives strongly felt that the wording of article 135 should follow more closely the language of article 66 of the Statute of the International Court of Justice (ICJ) upon which it was patterned.

Article 136

20. No comments were made regarding this article, which corresponds to article 105 of the ICJ Rules.

Article 137

21. One representative proposed that the word "ascertained", which made it incumbent upon the Chamber to find out the opinion of the parties, should be replaced by "requested" or "sought", which would put the onus on the parties.

22. However, other representatives opposed this proposal or favoured keeping the present wording, which largely follows article 106 of the ICJ Rules.

Article 138

23. In introducing this article, which, inter alia, provides for the reading of advisory opinions and lists the components of an advisory opinion, the Secretary of the Special Commission drew attention to paragraph 1, which is new. The second sentence of that paragraph was drafted on the advice of the Registrar of the EEC Court who had drawn attention to the Rules of that Court which provide that when it is a matter of urgency, or in order to avoid delays, the opinion may be read at a public sitting at which all Members and Members ad hoc of the Chamber constituting the bench may not be present.

24. To bring article 138 into harmony with the already revised provisions of the draft Rules, references to the Members and Members ad hoc were included in paragraphs 2 and 3.

25. In the discussion one representative suggested the following beginning for the new sentence in paragraph 1: "Where the advisory opinion is to be rendered as a matter of particular urgency". This, he argued, was necessary for the sake of differentiation from the general-urgency rating applicable to all advisory opinions (see art. 191 of the Convention).

26. Opposing this view, other representatives wanted to know what criteria would be used to differentiate the categories of urgency if the notion of "particular urgency" was introduced. In the end it was agreed that the first part of the second sentence of paragraph 1 should be deleted so that that sentence would read as follows: "The President or acting President may read the opinion at a public sitting at which all Members and Members ad hoc of the Chamber constituting the Bench may not be present."

27. Taking account of statements made during the first reading of the draft Rules on the components of an advisory opinion, the Special Commission agreed to formulate the seventh line of paragraph 2 as follows: "the reasons of fact and law on which it is based."

28. Several representatives felt there was a need to establish concordance between the French and Spanish versions of this article and the English text.

Article 139

29. In introducing this article, the Secretary of the Special Commission pointed out that this provision closely followed the wording of article 108 of the ICJ Rules.

30. One representative suggested that in addition to the Secretary-General of the International Sea-Bed Authority, the representatives of the members of the International Sea-Bed Authority and the international organizations immediately concerned, the Registrar should also inform the body which had requested the

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advisory opinion. The majority of representatives felt however that this addition was superfluous since the duties of the Secretary-General of the International Sea-Bed Authority as chief administrative officer of that organization at any rate included the passing of the information received from the Registrar of the Tribunal, to the Assembly and the Council of the International Sea-Bed Authority. Under articles 159 (10) and 191 of the Convention only these bodies may request advisory opinions.

Article 140

31. This article, which deals primarily with the sending of copies of advisory opinions to the Secretary-General of the International Sea-Bed Authority and the United Nations Secretary-General, follows article 109 of the ICJ Rules.

32. One representative felt that a copy should also be sent to the body requesting the advisory opinion. Other representatives argued against this addition by saying that it was superfluous since the chief administrative officer of the International Sea-Bed Authority was its Secretary-General, who was also the addressee of documents intended for the Council or the Assembly.

33. Following the conclusion of the consideration of the remaining articles of the revised draft Rules, representatives were asked to raise any other issue of special concern to them in connection with the revised draft Rules. Subsequently, one representative put forward suggestions for the redraft of articles 89 to 91 and 93 of the revised draft Rules dealing with the prompt release of vessels and crews (LOS/PCN/SCN.4/WP.2/Rev.1/Part I). In response to a request made by several representatives, those suggestions were circulated as a conference room paper (LOS/PCN/SCN.4/1987/CRP.22).

34. The Special Commission began the discussion of the conference room paper with a general exchange of views on those suggestions. The several representatives who expressed agreement with the suggestions emphasized that the proposed amendments would take care of the need to balance the interests of flag and coastal States and that they represented a substantial improvement on the rules concerning the prompt release of vessels and crews contained in document LOS/PCN/SCN.4/WP.2/Rev.1/Part I.

35. Several other representatives on the other hand, pointed out that, due to lack of time they had been unable to undertake an in-depth study by them of the suggested redraft, and they required more time for this purpose. Thus they could not at this stage make final comments on the suggestions made. A number of them therefore reserved the right to put forward concrete proposals on the redraft at a later stage.

36. Eventually, the Special Commission agreed to hold a preliminary exchange of views on document LOS/PCN/SCN.4/1987/CRP.22 and review the suggestions made therein article by article.

Suggestions concerning article 89

37. The representative who made these suggestions informed the Special Commission that one of the goals of paragraph 4 of this article was to ensure the early

receipt of the most complete data about the detained ship. It was also pointed out that, after the adoption in 1924 of the Convention on the Limitation of the Liability of Owners of Sea-going Vessels, international practice recognized that the concept of the liability of shipowners should not be limited by the value of the ship or calculated on the basis of its tonnage, but should be based on its cargo capacity. This practice was reflected in the 1957 Convention on the Limitation of the Liability of Owners of Sea-going Ships, the 1969 International Convention on Civil Liability for Oil Pollution Damage, the 1971 International Fund for Compensation for Oil Pollution Damage, the 1979 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and the 1976 Convention on the Limitation of Liability for Marine Claims.

38. Accordingly, international practice has already established the volume and nature of information about a ship and its cargo necessary to determine liability. That is why reference to cargo capacity in paragraph 4 of article 89 will automatically imply the volume and nature of the information to be presented.

39. On this basis, the representative concerned proposed that in the second sentence of article 89 (4) the words "relevant to the determination of its value" should be replaced by the words "to be taken into account in determining the limit of liability". This would also ensure that the Tribunal would not waste extra time requesting additional information which might lead to the prolongation of the detention of the vessel, which would lead to adverse financial consequences for the vessel and the flag State. The proposed amendment was not meant to predetermine the extent of liability which, to a considerable extent, was already found in international agreements.

40. A number of representatives expressed doubts as to the usefulness of the proposed redraft of paragraph 4. They favoured the retention of the formulation presented by the Secretariat which is contained in document LOS/PCN/SCN.4/WP.2/Rev.1/Part I.

41. One view was that the redraft might prejudge the proceedings before the appropriate domestic forum pursuant to article 292 (3) of the Convention. By contrast, article 292 (3) of the Convention made it unequivocally clear that "the court or tribunal ... shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

42. One objection was that the proposed change in the wording of paragraph 4 of article 89 would result in a text which would appear not to be in conformity with article 292 of the Convention. That article deals with the prompt release of vessels detained on the basis of an allegation of non-compliance with the Convention and thus subject to liability and criminal responsibility as in the case of an infringement of articles 73 and 220 of the Convention.

43. With reference to the introductory remarks of the representative submitting the suggestions, it was declared that a limit of liability on the basis of cargo capacity did not cover all types of vessels, in particular fishing vessels, research vessels and ships used for specific purposes such as drilling. It was

also noted that vessels of a very large capacity for cargo might in some cases be of very low value because of their age.

44. Some representatives supported the suggested redraft of article 89 (4). They felt that it adequately reflected current international practice in the matter. They argued that the redraft was designed to limit the time of detention and to offer as much information as possible about the vessel in order to preclude time-consuming requests for further particulars on the part of the court or tribunal. It was suggested, however, that more precise language could be found in order to make it fully clear that there is no intention to limit liability in advance. One representative felt in this connection that the term "limit of liability" should be replaced by "extent of liability".

45. Another representative was of the view that article 89 (4) of the draft Rules should differentiate more clearly between cases where a vessel is detained for a violation of coastal State rules on fisheries and cases where such detention is due to a violation of rules for the protection of the marine environment. It was therefore proposed that in the second sentence of paragraph 4 the following words should be added after "regarding its crew": "and the degree of wrong or damage allegedly committed by them."

46. A number of representatives felt however that the draft presented by the Secretariat contained a fairly exhaustive list of information to be provided and that they would prefer that formulation instead of the proposal put forward by the Union of Soviet Socialist Republics. Another proposal, contained in paragraph 2 of LOS/PCN/SCN.4/1987/CRP.22, was to incorporate in article 89 a new paragraph 5 to the effect that the flag State of the vessel shall be deemed to have fulfilled the requirements of article 295 of the Convention in the part relating to the release of the detained vessel and its crew if, after the expiry of 10 days from the time of detention of the vessel and following the posting of a reasonable bond or other financial security as provided for in article 292 (1) of the Convention, the detaining State does not release the vessel and its crew.

47. When this proposal was introduced it was pointed out that its purpose was to avoid a misunderstanding to the effect that article 295 of the Convention was applicable to article 292 of the Convention.

48. Some representatives supported the proposal to include this new paragraph 5 in article 89. This, they argued, would make it clear that the very nature of the procedure provided for in article 292 excluded the application of article 295. Article 292 was exceptional and autonomous in nature. Moreover, the proposed provision was expediting the proceedings and was therefore in line with the requirement of article 292 (3) of the Convention according to which the court or tribunal shall deal, without delay, with the application for release.

49. Other representatives however opposed the inclusion of this proposal, arguing that the incorporation of the proposed paragraph 5 into article 89 was superfluous in view of the content and thrust of articles 292 and 295 of the Convention. It was pointed out in this context that the two articles covered different situations.

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50. One representative contended that the prompt release of vessels procedure was a special case of diplomatic protection. This followed clearly from the wording of paragraph 1 of article 292, which states clearly that if "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security," the flag State has the right to negotiate with the detaining State from the very first moment of the detention and within the 10-day period with a view to reaching an agreement on the submission of the question to any court or tribunal.

51. According to the representative in question, such negotiations conducted by the flag State could in no way be regarded as a recourse to local remedies because it was the citizen (i.e. in principle a private entity) who was under an obligation to exhaust the local remedies and not the State itself.

52. The fact that article 295 was not applicable to article 292 was also confirmed by paragraph 3 of article 292, according to which any decision of the Tribunal on the question of release shall be without prejudice "to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". From this provision it resulted clearly that the prompt release procedure, a parallel development of the international procedure (i.e. the one before the Tribunal) and of the domestic one, was envisaged and that the existence of a domestic procedure which had not been concluded as yet in no way constituted an impediment to the progress of the international procedure.

53. The existence of the above-mentioned parallel competence (international and domestic), it was felt, derived furthermore from the last sentence of paragraph 3 of article 292, in which it is declared that "the authorities of the detaining State remain competent to release the vessel or its crew at any time". If article 295 were applicable, such coexistence of procedures would not be conceivable.

54. During discussion of article 89, one representative proposed the deletion of the second sentence of paragraph 1, which states that any application for the release of a vessel or its crew may only be submitted to the Tribunal after the expiry of the time-limit specified in article 292 (1) of the Convention. The meaning of that sentence was already expressed in the first sentence of that paragraph. To keep the sentence, it was argued, would likely lead to confusion since it was presumably intended to reflect the latter part of article 292, yet it did so in very different language.

Suggestions concerning article 90

55. With reference to an earlier discussion on paragraph 2 (see document LOS/PCN/SCN.4/L.7/Add.1, p. 12), the proposal was made to say "the earliest practicable date, but not exceeding 10 days" instead of "a date not exceeding two weeks", as currently worded.

56. This proposal met with support in the Special Commission. Those in favour pointed, for example, to the importance of the Tribunal fixing the earliest possible date for the hearing in order for the detained vessel to be released.

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57. In the discussion of paragraph 2 of article 90, another representative expressed a wish for the deletion of the part of the last sentence reading "which shall be taken into account by the Tribunal or chamber, as the case may be." That representative felt that it would appear sufficient to say that the Tribunal shall take into account the observations of the parties since it was quite clear that the Tribunal would have to pay very great attention to the observations of the parties.

58. It had been proposed in paragraph 4 of document LOS/PCN/SCN.4/1987/CRP.22 that paragraph 3 of article 90 should be supplemented in such a way that after the words "within one week of the receipt of notice of the application" the following should be added: "but in any event not later than 10 days following the dispatch of the said notice."

59. This proposal met with support in the Special Commission. It was felt that the proposal would be helpful in expediting proceedings before the Tribunal. It was moreover argued that the proposed addition to paragraph 3 took account of the time-limits contained in article 292 of the Convention. One representative however expressed another opinion, that the proposed time-limit might, in certain situations, not meet the interests of the parties.

60. The prevailing view was that the proposed 10-day limit should not be measured from the time of dispatch of the said notice but from the time of receipt by the Registrar.

Suggestions concerning article 91

61. When the proposed redraft of article 91 (1) was explained, it was pointed out that in many ways the redraft took into account the existing text of document LOS/PCN/SCN.4/WP.2/Rev.1/Part I. Since a reference to the value of the vessel as currently formulated in paragraph 1 of this article would run counter to established international practice (see the discussion on article 89 above), the suggestion was made to delete such reference. The last sentence of the proposed redraft of paragraph 1, according to which the Tribunal or Chamber may consider the guarantee by the flag State of the vessel as sufficient security, took into account the opinion expressed during earlier discussions on the draft Rules of the Tribunal concerning the prompt release of vessels and crews (see LOS/PCN/SCN.4/L.4/Add.1, p. 4, art. 88 C, para. 1).

62. The discussion revealed that, instead of the submitted draft, most representatives preferred the versions of article 91 (1) contained in document LOS/PCN/SCN.4/WP.2/Rev.1/Part I.

63. With reference to the first sentence of the original draft of this paragraph, according to which reasonable bond or other financial security shall not exceed the value of the vessel, the view was expressed that this limitation of the bond must not be automatically applicable to those cases where a vessel is detained for violating coastal State fisheries regulations. In such cases the value of the fish illegally caught must be the yardstick.

64. Some delegations, however, spoke in support of the redraft of paragraph 1 as proposed. They considered it a genuine improvement over the original draft. They particularly welcomed the deletion of the phrase "which shall not exceed the value of the vessel". In the discussion the proposal was made to replace in the first sentence of the suggested redraft of article 91 (1) the word "forthwith" by the words "promptly" and "without delay", respectively.

65. Several representatives had reservations regarding the fourth sentence of the suggested redraft of paragraph 1. They found the language used too general and they wanted to have an express reference to government ships operated for commercial purposes.

66. A number of representatives maintained that the suggested redraft departed from the text of article 292 of the Convention, which provides only for the posting of a bond or other financial security. While a bond was directly enforceable in a court of law, this was not necessarily true for a government guarantee.

67. The representative making the suggestions also proposed a redraft of paragraphs 2 and 3 of article 91. The proposal was designed to facilitate the procedure of posting a financial security by the flag State. That representative was of the view that the flag State should have the right to choose whether to post the bond with the Tribunal or with the detaining State.

68. Several representatives were unable to associate themselves with the thinking underlying the redraft, i.e. that the flag State should have the right to choose where to post the bond. They considered it unacceptable for the bond to be posted at any place other than the Tribunal.

69. Other representatives, who supported the suggested redraft, argued that the redraft took into account international practice in this area, where numerous examples were known of bond having been posted with the detaining State. That practice could not be disregarded.

Suggestions concerning article 93 (1)

70. According to this redraft, the Registrar shall transmit the bond or other financial security to the detaining State in the amount necessary for the execution of the decisions of the appropriate domestic court or the Tribunal, if the bond or other financial security was posted with the Tribunal in accordance with the wishes of the flag State. During the introduction of the redraft it was pointed out that it should be seen in close connection with the submitted redraft of article 91, paragraphs 2 and 3. The reason for these provisions was to make it easier for the flag State to choose whether to post the bond with the Tribunal or with the detaining State.

71. The Special Commission only held a brief, preliminary exchange of views on the suggested redraft of article 93 (1).

72. A number of representatives reaffirmed what they had said in the discussion on article 91 (2) and (3), i.e. that the flag State should not be entitled to choose

where to post the bond. However, several representatives supported the suggested redraft.

73. In conclusion, the Special Commission agreed that at an appropriate time during the sixth session representatives should be given another opportunity to present their positions on the suggested redraft of articles 89 through 91 and 93 of the revised draft Rules as contained in document LOS/PCN/SCN.4/1987/CRP.22.

74. In the course of the examination of the revised draft Rules and of document LOS/PCN/SCN.4/1987/CRP.22, a number of other proposals of a drafting nature were made which were submitted to the Secretariat in writing.

75. Since the present paper is a summary of the discussions, it is not possible to reflect each and every intervention made or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and they will be taken into account. Should any delegation feel that an important matter has been omitted, the Chairman would appreciate being informed.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY AND
FOR THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Revised draft rules of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.2/Rev.1 (Part I))

Part IV. Proceedings in disputes

Section D. Incidental proceedings

Subsection 2. Prompt release of vessels and crews

1. As decided earlier (see LOS/PCN/SCN.4/L.10, para. 73), the Special Commission continued the consideration of the suggested redraft of articles 89 to 91 and 93 of the revised draft rules of the International Tribunal for the Law of the Sea contained in document LOS/PCN/SCN.4/1987/CRP.22. In the course of the discussion a number of other proposals concerning the articles dealing with the prompt release of vessels and crews were also considered. These proposals are contained in documents LOS/PCN/SCN.4/1988/CRP.23 to 30.

Suggestions concerning article 89

2. Some delegations welcomed the proposed redraft of article 89, paragraph 4, as contained in paragraph 1 of document LOS/PCN/SCN.4/1987/CRP.22. They argued that it would expedite proceedings for the prompt release of vessels and crews and expressed the view that the information concerning the vessel, required under article 89, paragraph 4, was only designed to assist the Tribunal in determining the amount of reasonable bond or other security. Corroborating the proposal made in document LOS/PCN/SCN.4/1987/CRP.22, paragraph 1 (in document LOS/PCN/SCN.4/L.10, paras. 37-39), the delegations pointed out that it was widespread international practice in determining the amount of reasonable bond or other security to employ the method that was used to set the limits of liability of a vessel.

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3. Another view expressed was that article 89, paragraph 4, should state explicitly that the Tribunal required the information concerning the vessel as described in the article to determine the amount of the reasonable bond or other security. It was therefore proposed to replace the phrase "other data relevant to the determination of its value" in the second sentence of article 89, paragraph 4, by the words "the data to be taken into account in determining the amount of the reasonable bond or other security". That formula was flexible because it did not restrict the scope of information and could therefore cover all data that are of relevance to the determination of the reasonable bond or other security.

4. Other delegations preferred to see article 89, paragraph 4, retained as presently worded in document LOS/PCN/SCN.4/WP.2/Rev.1 (Part I). Those delegations felt that under article 292 of the Convention it was of course incumbent upon the Tribunal to determine the amount of the bond or other financial security, which made it unnecessary to change paragraph 4. With reference to the need for flexibility in collecting the data, it was also pointed out that that was ensured by the words "and other data" in the second sentence of paragraph 4. The present wording of article 89, paragraph 4, contained in document (LOS/PCN/SCN.4/WP.4 (Part I)) covered all kinds of information. It was also felt that the listing of various types of information in this article was illustrative rather than exhaustive.

5. One delegation was of the view that the amount of the bond or other security shall not exceed the value of the vessel. That value must be the upper limit of the bond. Therefore, the reference to the value of the vessel in article 89, paragraph 4, should not be deleted. It was further suggested that in article 89, paragraph 4, should be phrased "taking into account the data required for determining the amount of the reasonable bond or other security as well as the other data relevant to the determination of the value of the vessel".

6. To reconcile the various views expressed in the course of the discussion on article 89, paragraph 4, it was suggested that appropriate language be included in the second sentence which would not limit the information to be requested by the Tribunal. This would give the Tribunal an even greater measure of flexibility in requesting information concerning the vessel.

7. One delegation reaffirmed its opinion that in cases where a foreign fishing vessel was being detained for violating the fisheries regulations of a coastal State, the amount of the reasonable bond or other financial security must not be geared to the value of the vessel. Rather, in such cases the criterion for the amount of the bond should be the value of the illegally caught fish (see also LOS/PCN/SCN.4/L.10, paras. 43 and 63). Accordingly, that delegation proposed that a new provision should be included in the draft rules either as a new article or a separate paragraph of article 89, which would give the coastal State greater leverage vis-à-vis flag States whose fishing vessels violated fisheries regulations of a costal State, since article 73, paragraph 3, of the Convention had placed heavy restrictions on coastal States in that respect. That provision could read as follows: "In view of paragraph 3 of article 73 of the Convention the reasonable bond or other security for prompt release of foreign fishing vessels and crews in respect of fishing offences shall be commensurate with the value of the fish alleged to have been caught illegally by the accused".

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8. A number of delegations had misgivings about this proposal. They argued that there was no well established international practice for the separate treatment of detained fishing vessels in fixing the amount of a bond or other financial security. Since the proposal was opposed by several delegations it was withdrawn by the delegation that had made it. Other delegations renewed the suggestion to delete the second sentence of article 89, paragraph 1, since the meaning of that sentence was already reflected in the first sentence of that paragraph (see LOS/PCN/SCN.4/L.10, para. 54). Some delegations, however, opposed this suggestion.

9. As a result of the discussion on paragraph 1 of document LOS/PCN/SCN.4/1987/CRP.22 the Secretariat prepared a redraft of article 89, paragraph 4, which is contained in document LOS/PCN/SCN.4/1988/CRP.23. When that document was introduced by the secretary it was pointed out that the redraft was to the effect that the Tribunal shall be provided with such information concerning the vessel and crew as is absolutely indispensible for taking a decision on the application for the release of a vessel, while leaving it open to the applicant to submit to the Tribunal whatever further information he considers relevant.

10. A number of delegations found the redraft contained in document LOS/PCN/SCN.4/1988/CRP.23 acceptable in principle. It was proposed, however, that the word "required" in the third sentence should be replaced by the word "imposed" for the sake of uniformity and the wording of the draft rules (see for example article 91, para. 1). It was also suggested that the fifth sentence of the redraft be placed before the fourth sentence.

11. During the discussion of document LOS/PCN/SCN.4/1988/CRP.23 other delegations reaffirmed that article 89, paragraph 4, should reflect clearly that the Tribunal would require the information concerning the vessel in order to be able to determine the amount of the reasonable bond or other financial security. It was therefore proposed to reformulate the second sentence of the redraft in such a way that the statement of facts should contain a phrase requiring the Tribunal to have all the information relevant to determine the amount of the reasonable bond or other financial security. It was also suggested that the fifth sentence, which is to the effect that the statement may include any further information that the applicant considers relevant, could possibly be deleted since it states the obvious.

12. Doubts were expressed concerning the new paragraph 5 of article 89 which states that the Tribunal may at any time require further information to be provided in a supplementary statement. It was felt that the provision could delay the proceedings for the prompt release of vessels.

13. Several delegations were of the view that article 89, paragraph 4, as redrafted in document LOS/PCN/SCN.4/1988/CRP.23 refers only to information the Tribunal would receive from the applicant, i.e. the flag State. They felt, however, that the detaining State should expressly be given the opportunity to comment on the application and to transmit information to the Tribunal which may include the scope of the damage caused by the detained vessel. It was not sufficient for the coastal State to present its case only at the hearing to be fixed under article 90, paragraph 2, of the rules.

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14. The view was expressed that in order to establish a balance between the scope of information to be provided by the applicant on the one hand and by the coastal State on the other, thought might be given to laying down a minimum information requirement that should be provided by the coastal State in connection with the hearing to be fixed under article 90, paragraph 2. Another possibility of establishing such a balance would be to insert the words "in particular" after the word "information" in the fourth line of redrafted article 89, paragraph 4.

15. Other delegations argued that with reference to article 292, paragraph 2, of the Convention, the application for release may be made only by or on behalf of the flag State of the vessel and that the information to be provided by the flag State was the exclusive basis for the proceedings for the prompt release of vessels.

16. In light of the divergent views expressed on the need for a balance between the interests of the coastal and the flag State in this matter it was suggested that, as a compromise, the fourth and fifth sentences of article 89, paragraph 4 of document LOS/PCN/SCN.4/1988/CRP.23 should be reformulated to the effect that the statement may include any further information the applicant considers relevant to the determination of the amount of a reasonable bond or other financial security and to any other issue in the proceedings. A certified copy of the application should forthwith be transmitted by the Registrar to the detaining State which may lodge an answering statement. The delegation which proposed this solution pointed out that the lodging of an answering statement by the detaining State was optional and must not interfere with the observance of the procedural time-limits envisaged in article 90, paragraph 2.

17. A number of delegations had problems with this proposal. They felt that this would give the flag State an advantage over the coastal State and that it again refers to the determination of the reasonable bond or other financial security. However, these delegations welcomed the basic idea of providing for an answering statement by the detaining State. It was also suggested that the new proposal should require the flag State to include information such as the circumstances under which the vessel was detained and the extent of any damage caused by the vessel. Moreover, the word "may" was to be replaced by the word "should". With reference to article 292, paragraph 3, of the Convention, which says, among other things, that the Tribunal shall deal only with the question of release, it was suggested to supplement the first sentence of the proposal by the words "for the release".

18. Doubts were expressed about the second sentence of the proposal which, it was felt, could delay proceedings for the prompt release of vessels. Therefore, it was suggested, the lodging of an answering statement by the detaining State should be made within the time-limits provided for in article 90, paragraphs 2 and 3. Accordingly, the second sentence of the proposal should therefore refer to article 90, paragraphs 2 and 3.

19. Opposing this addition other delegations argued that it would confuse the different stages of the proceedings regulated in articles 89 and 90.

20. Taking account of the views and proposals put forward in the discussion of document LOS/PCN/SCN.4/1988/CRP.23 the Secretariat, as a compromise proposal, prepared a revision of that document (LOS/PCN/SCN.4/1988/CRP.23/Rev.1).

21. It was emphasized in the introduction of this document that the detaining State is expressly given the opportunity to submit, in response to the statement of the flag State, a statement of its own containing such information as may be considered relevant by the detaining State, including information relating to the circumstances in which the vessel is detained and, if relevant, the extent of damage claimed to have been caused by the vessel (see LOS/PCN/SCN.4/1988/CRP.23/Rev.1, para. 5). In order to avoid delays of the entire procedure that may be caused by the lodging of a statement in response (pursuant to para. 5), it was suggested that the time-limits should be fixed, possibly in a separate article, within which that statement must be made. These time-limits could be patterned on article 90 of the draft rules.

22. The Special Commission viewed the proposal contained in document LOS/PCN/SCN.4/CRP.23/Rev.1 as an acceptable, and on the whole a well-balanced, compromise which largely takes account of the views expressed in the discussion.

23. With reference to paragraph 5 of the proposal, one delegation raised the question whether the statement to be made in response to that of the applicant may also say something about the amount of the bond or financial security. In reply it was explained that paragraph 5 had been drawn up in very general terms and that it referred to all four substantive elements in paragraph 4, including the amount of the bond or other financial security.

24. Another delegation felt that the right of the Tribunal at any time to require further information pursuant to paragraph 6 could only refer to such information as was absolutely relevant to the prompt release of vessels procedure. Beyond that, that delegation favoured the fixing of certain time-limits in order to avoid delays in the procedure, as had been suggested by the secretary of the Special Commission in introducing document LOS/PCN/SCN.4/CRP.23/Rev.1.

25. In the course of the brief discussion on the compromise proposal put forward by the Secretariat, the opinion was expressed that it was well drafted and should not, therefore, be changed. It was necessary, however, to harmonize the text in various languages with the English version.

26. The Special Commission, having taken into account the views expressed, adopted the compromise proposal on article 89 of the draft rules of the Tribunal as submitted in document LOS/PCN/SCN.4/1988/CRP.23/Rev.1.

27. Subsequently, the Special Commission continued the consideration of the proposal contained in document LOS/PCN/SCN.4/1987/CRP.22, paragraph 2, to add a new paragraph 5 to article 89 (see LOS/PCN/SCN.4/L.10, paras. 46-53). According to that proposal the flag State shall be deemed to have fulfilled the requirements of article 295 of the Convention in the part relating to the release of the detained vessel and its crew if, after the expiry of 10 days from the time of detention of the vessel and following the posting of a reasonable bond or other financial

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security as provided for in article 292, paragraph 1, of the Convention, the detaining State does not release the vessel and its crew.

28. It was pointed out in the Special Commission that article 295 of the Convention dealing with the exhaustion of local remedies and article 292 of the Convention are not applicable since the prompt release of vessels and crews is a specific arrangement which would be pointless if recourse to that procedure was admissible only after exhaustion of local remedies. It is therefore superfluous to incorporate an additional paragraph 5 into article 89 of the draft rules of the Tribunal as proposed in paragraph 2 of document LOS/PCN/SCN.4/1987/CRP.22.

29. A number of delegations felt, however, that article 89 should state explicitly that article 295 was not applicable to cases under article 292 of the Convention. The following language was suggested for article 89, paragraph 5: "Article 295 of the Convention does not apply to the prompt release of vessels and crews."

30. The counter-argument was not to incorporate such a provision into the draft rules of the Tribunal as this would constitute an interpretation of the Convention.

31. In conclusion, since there was general agreement to the effect that article 295 of the Convention is not applicable to cases covered by article 292, the Special Commission concurred in that there should be no specific provision on this matter in the draft rules of the Tribunal.

Suggestions concerning article 90

32. The Special Commission continued the consideration of the two proposals relating to article 90, paragraph 2, of the draft rules. One proposal was to state that the time-limit envisaged in paragraph 2 should be the earliest practicable date, but not exceeding 10 days instead of "a date not exceeding two weeks" as currently worded. The second proposal was to delete the words "which shall be taken into account by the Tribunal or Chamber, as the case may be" at the end of paragraph 2. These proposals had been the subject of an earlier exchange of views (see LOC/PCN/SCN.4/1987/CRP.22, para. 3, and LOS/PCN/SCN.4/L.10, paras. 55-57).

33. As a result of the resumed brief discussion the Special Commission adopted these two amendments.

34. The Special Commission also resumed the discussion of a proposal to the effect that in paragraph 3, after the words "within one week of the receipt of notice of the application", the following should be added: "but in any event not later than 10 days following the dispatch of the said notice" (see LOS/PCN/SCN.4/1987/CRP.22, para. 4, and LOS/PCN/SCN.4/L.10, paras. 58-60). The prevailing view in the Special Commission continued to be that the proposed 10-day limit should not be measured from the time of the dispatch of the said notice but from the time of its receipt.

35. The Special Commission adopted the amendment on paragraph 3 with this modification.

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36. Towards the end of the discussion on article 90 the suggestion was made to change paragraph 1 of that article to reflect the provisions proposed in document LOS/PCN/SCN.4/1988/CRP.30. According to this proposal, in determining the degree of priority between an application for release and a request for provisional measures, the Tribunal was to bear in mind the nature, scope and circumstances of such request and application.

37. This change was necessary since article 84, paragraph 1, of the draft rules of the Tribunal does not provide guidance in cases in which a request for provisional measures and an application for the release of vessels and crews are simultaneously before the Tribunal. The proposal submitted was very flexible and seeks to preserve the discretionary powers of the Tribunal.

38. Other delegations felt that article 84, paragraph 1, and article 90, paragraph 2, as currently worded, were fully adequate and gave the Tribunal clear guidelines. In particular, attention was drawn to article 84, paragraph 1, according to which the priority of a request for provisional measures shall not affect applications made under article 292 of the Convention, which shall be dealt with without delay.

39. The Special Commission was unable to reach agreement on the proposal made in document LOS/PCN/SCN.4/1988/CRP.30. It was agreed, however, that interested delegations should consult on the suggestion in order to seek a compromise formula that would be generally acceptable to the Special Commission.

Suggestions concerning article 91

40. The Special Commission continued the discussion of proposals to amend article 91 (for preceding discussion, see LOS/PCN/SCN.4/L.10, paras. 61-69).

41. As a result of the previous exchange of opinions, a number of delegations comprising the members of the European Economic Community submitted a suggested redraft of article 91 as a compromise proposal. It is contained in document LOS/PCN/SCN.4/1988/CRP.25. Apart from the outcome of earlier discussions this redraft also takes account of recent considerations and proposals. This redraft touches upon the following four main problems:

(a) In the introduction of document LOS/PCN/SCN.4/1988/CRP.25, it was pointed out that special reference was made to the third sentence of paragraph 1 which states that the Tribunal or Chamber may consider a guarantee by the flag State of the vessel as sufficient financial security, provided that it is as enforceable as an ordinary bond deposited by any other person. It was argued that this formula, while building on the proposal contained in document LOS/PCN/SCN.4/1987/CRP.22, paragraph 5, also takes account of the requirements of general business practice;

(b) Attention was also drawn to the fifth sentence of document LOS/PCN/SCN.4/1988/CRP.25, paragraph 1, which raises a new problem in the context of the prompt release of vessels procedure. The formulation proposed was designed to prevent vessels from being detained unduly on the pretext that they presented an unreasonable threat of damage to the marine environment and were in abuse of article 226, paragraph 1 (c), of the Convention;

(c) Paragraph 2 of document LOS/PCN/SCN.4/1988/CRP.25 takes account of a proposal submitted in paragraph 5, subparagraphs 2 and 3, of document LOS/PCN/SCN.4/1987/CRP.22. The present redraft of article 91 proceeds from the assumption that as a rule the bond or security shall be posted with the Tribunal. At the request of the flag State of the vessel, however, the Tribunal or Chamber may recognize as equally valid the posting of the bond or security in the detaining State. The present paragraph 3, which provides for notification obligations, flows logically from paragraph 2;

(d) Paragraph 4 of document LOS/PCN/SCN.4/1988/CRP.25 concerns the reimbursement of a bond or security if the purpose of such bond or security no longer exists. This, among other things, provides for a situation where the Tribunal overrules the reasons given by the detaining State for arresting the vessel, so that a reimbursement of the bond or other financial security becomes necessary. Moreover, this proposal, it was argued, reflected the commercial nature of the deposit of a bond or security.

42. The Special Commission took up the main questions raised in document LOS/PCN/SCN.4/1988/CRP.25 one by one.

(a) The question of a guarantee of the flag State of the vessel

43. The redraft of article 91, paragraph 1, takes up the basic idea underlying document LOS/PCN/SCN.4/1987/CRP.22, paragraph 5, subparagraph 1, to the effect that the guarantee of the flag State of the vessel should be considered sufficient security. This redraft also meets the requirements of international commercial practice because one of its provisions stipulates that a guarantee of the flag State would have to be as enforceable as an ordinary bond.

44. Some delegations supported this redraft. They also welcomed the stipulation which the redraft provides for the enforceability of a State guarantee.

45. Other delegations, however, opposed the redraft on the grounds that it was not clearly formulated and that many problems were left open.

46. Another opinion expressed was that the redraft presented difficulties in that it made the recognition of a State guarantee dependent on conditions. Moreover, the principle of enforceability of a State guarantee as any other ordinary bond would cause a great deal of legal insecurity to the flag State. This principle also did not take into account international practice which, in terms of recognition, did not differentiate between a cash bond and a State guarantee. Some delegations therefore preferred the wording used in CRP.22 (para. 5, subpara. 1, last sentence).

47. Other delegations stated that it was only for the Tribunal to decide whether or not a guarantee was adequate and enforceable. Accordingly, it was suggested to replace the third sentence of article 91, paragraph 1, in document LOS/PCN/SCN.4/1988/CRP.25 by a provision which would state that the Tribunal or Chamber may consider whether a guarantee by the flag State of the vessel is sufficient security for the prompt release of the vessel.

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48. A number of delegations were of the view that the possibility of a State guarantee should only be granted to government ships, because if the admissibility of State guarantees were extended to other categories of ships, e.g. privately owned vessels, there would be a risk that ship-owners would exert pressure on the Government of the flag State to ensure that a State guarantee is granted for that vessel. Therefore, the third sentence of the present redraft of article 91, paragraph 1, should be deleted.

49. Other delegations opposed this view. They stated that it was the exclusive right of any State to decide whether or not to provide a guarantee for the vessels flying its flag. Apart from this reasoning, attention was also drawn to article 292, paragraph 2, of the Convention, under which an application for release may be made only by or on behalf of the flag State of the vessel. It therefore followed that a State must have the right to decide whether or not it should provide a guarantee. On no account, however, would a State be under an obligation to do so.

50. Other suggestions were to delete in document LOS/PCN/SCN.4/1988/CRP.25, paragraph 1, third sentence, the words "deposited by any other person", to insert in document LOS/PCN/SCN.4/1987/CRP.22, paragraph 5, subparagraph 1, last line, the word "financial" before the word "security", and to add in document LOS/PCN/SCN.4/1988/CRP.25, paragraph 1, third sentence, after the word "enforceable" the phrase "in the detaining State" in order to enable the detaining State to enforce the guarantee.

51. These proposals failed to gain general approval.

52. The discussion on the question of a flag State gauarantee was continued on the basis of a compromise proposal submitted by the Secretariat in document LOS/PCN/SCN.4/1988/CRP.28, paragraph 1.

53. In introducing document LOS/PCN/SCN.4/1988/CRP.28, paragraph 1, the secretary of the Special Commission underlined the fact that the compromise proposal was in line with international commercial practice, but it also took account of the bilateral practice between the flag State and the detaining State.

54. This redraft was basically acceptable to the Special Commission. The suggestion of one delegation that the paragraph should end after "flag State" in the last sentence was not supported and it was therefore withdrawn in a spirit of compromise.

55. A number of proposals were put forward to make the wording of this redraft more precise. Thus, it was suggested to insert in the last sentence after the word "enforceable" the phrase "in the detaining State as well as" in order to make clear that the guarantee must be enforceable both in the detaining State and under international commercial practice.

56. Another delegation proposed, with reference to the wording of article 91, paragraph 1, third sentence, in document LOS/PCN/SCN.4/WP.2/Rev.1 (Part I) and with reference to document LOS/PCN/SCN.4/1987/CRP.22, paragraph 1, fourth sentence, that

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the redraft of document LOS/PCN/SCN.4/1988/CRP.28, paragraph 1, be supplemented by the following sentence: "The decision shall order the detaining State to release the vessel and its crew upon the posting of such a reasonable bond or other financial security". This proposal met with support in the Special Commission. The question was raised, however, whether it would not be better to make a separate paragraph of article 91.

57. Other proposals were to replace the word "and" in the second line of paragraph 1 by the words "and/or"; to delete the word "appropriate" in the third line; and to insert the word "the" in the last line after "and". The Special Commission accepted these suggestions which were designed to make the redraft more precise.

58. The Special Commission adopted the redraft of article 91, paragraph 1, with the above-mentioned amendments.

(b) The application of article 226, paragraph 1 (c), of the Convention

59. In the introduction of this suggestion it was pointed out that the fifth sentence of paragraph 1 of this document was included in the redraft in order to prevent the abuse of article 226, paragraph 1 (c), of the Convention and the inadmissible detention of vessels. It was only for the Tribunal to decide whether a vessel really posed an unreasonable threat of damage to the marine environment warranting its detention. Nor would the proposed provision violate article 292, paragraph 3, of the Convention under which the Court or Tribunal shall deal ... only with the question of release without prejudice to the merits of any case before the appropriate domestic forum against the vessel. In dealing with such a problem the Tribunal could have recourse to the generally recognised standards concerning the seaworthiness of vessels.

60. Many delegations believed, however, that article 292 of the Convention dealt comprehensively and exhaustively with the procedure for the prompt release of vessels and that there was no reason why the cases covered by article 226, paragraph 1 (c), should be singled out, since this would involve the risk of disturbing the balance between the interests of coastal States and flag States.

61. Another view expressed was that the Tribunal in deciding on the basis of article 226, paragraph 1 (c), of the Convention was under an obligation to deal with the merits of the case and that there was therefore no room for the application of article 292 of the Convention in the cases covered by article 226, paragraph 1 (c), of the Convention. It was also pointed out that rules on the seaworthiness of vessels may have the character of domestic regulations on which the Tribunal was not entitled to pass judgement. Another delegation felt that it was within the Tribunal's exclusive competence to decide in what circumstances the procedure provided for in article 292 would apply.

62. Finally, it was agreed to reflect the different views on the question of the application of article 292 of the Convention in cases covered by article 226, paragraph 1 (c), of the Convention in the Chairman's summary of discussion.

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(c) Should the bond be posted with the Tribunal or with the detaining State

63. The delegations which submitted LOS/PCN/SCN.4/1987/CRP.22 indicated that paragraph 5 of that document reflected the existing practice whereby some States deposit the bond of the flag State with the detaining State. They felt that that practice should also be embodied in the rules of the Tribunal. The formulation in the second sentence of paragraph 2 of document LOS/PCN/SCN.4/1988/CRP.25 to the effect that the Tribunal or Chamber may recognize as equally valid the posting of the bond or security in the detaining State was too vague because this would also permit the Tribunal or the Chamber not to recognize as equally valid the posting of the bond or security in the detaining State.

64. Another delegation was of the opinion that the right to choose where the bond should be posted would be in the interest of both the flag State and the detaining State. That delegation took guidance from document LOS/PCN/SCN.4/1987/CRP.22, paragraph 5, subparagraph 2, in proposing the formulation that at the request of the flag State of the vessel and after consulting the detaining State, the decision may indicate whether the bond or other financial security shall be posted with the Tribunal or with the detaining State.

65. Other delegations held the view that the promptness of the release of vessels could only be ensured if the bond or other financial security was deposited with the Tribunal, which, they felt, should be done as a rule.

66. The Special Commission continued its discussion of the question as to where the bond should be posted on the basis of a compromise proposal drafted by the Secretariat and contained in document LOS/PCN/SCN.4/1988/CRP.28, paragraphs 2-4. According to that proposal the bond or other financial security could be deposited either with the Tribunal or with the detaining State. It also provides for the notification and communication requirements arising out of such an arrangement.

67. Basically, the Special Commission could accept the redraft. However, suggestions were made to make the wording of paragraph 2 of document LOS/PCN/SCN.4/1988/CRP.28 more precise, e.g., by inserting the words "concerning the release of the vessel and its crew" after the word "Chamber". Another proposal was to replace the second sentence of that paragraph by the following: "In the latter case the Tribunal shall first ascertain the views of the detaining State and obtain the name of the competent authority of the detaining State with which the bond or other financial security shall be posted. The order of the Tribunal shall also indicate such competent authority." This would give the detaining State greater leverage concerning the determination of the place of deposit of the bond or other financial security.

68. In the course of the discussion the view was reaffirmed that the bond or other financial security should not be split up but should be deposited either with the Tribunal or with the detaining State.

69. The Special Commission adopted paragraph 2 with the proposed changes and paragraph 3 as drafted in document LOS/PCN/SCN.4/1988/CRP.28.

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70. The Special Commission adopted paragraph 4 with two minor changes.

(d) The question of reimbursement of a bond or other financial security

71. The Special Commission agreed to discuss this problem in connection with article 93 of the draft rules of the Tribunal.

Suggestions concerning article 93

72. The Special Commission continued to discuss the amendment proposals submitted earlier on article 93, paragraph 1 (see LOS/PCN/SCN.4/1987/CRP.22, para. 6 and LOS/PCN/SCN.4/L.10, paras. 70-72).

73. An amendment was made to that paragraph as contained in document LOS/PCN/SCN.4/1987/CRP.22 that the first sentence should be worded as the one contained in document LOS/PCN/SCN.4/WP.2/Rev.1 (Part I). This proposal was adopted.

74. The Special Commission also accepted the suggestion to refer to "relating to the vessel" instead of "against the vessel" in this paragraph; it was stated that the final judgement or award cannot from the outset be expected to be against the vessel. A proposal was therefore made and accepted by the Special Commission to reformulate the paragraph to bring out this meaning.

75. A proposal was made by one delegation to include the principle of the transfer of the bond in the first line of paragraph 1 of article 93. This would take care of the fact that the bond may also be deposited in cash. The Special Commission accepted this suggestion.

76. Another point of discussion was the phrase "as directed by it" in article 93, paragraph 1. While it was felt that this phrase was superfluous and should therefore be deleted, another opinion was that it should be retained, since in accordance with the redraft of article 91 as contained in document LOS/PCN/SCN.4/1988/CRP.28, paragraph 2, the Tribunal or Chamber may determine that the bond should be posted with the detaining State.

77. The Special Commission having decided earlier to resume the consideration of the question of reimbursement of the bond or other financial security had before it a proposal for a new paragraph 3 of article 93, which was submitted in document LOS/PCN/SCN.4/1988/CRP.29. When this document was introduced it was stated that the proposal intended to improve on paragraph 5 of document LOS/PCN/SCN.4/1988/CRP.25.

78. In the discussion on document LOS/PCN/SCN.4/1988/CRP.29 the question was raised whether it was at all necessary to include a provision on reimbursement in the draft rules of the Tribunal. The decision on reimbursement might just as well be left to the Tribunal on a case-by-case basis.

79. In response to this position it was pointed out that since the draft rules envisage the possibility of depositing the bond or other financial security with the detaining State, reimbursement as well would have to be regulated in these rules.

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80. Those delegations who were against the proposal contained in document LOS/PCN/SCN.4/1988/CRP.29 were of the view that one must not only focus on those situations in which reimbursement might become necessary. It was just as imaginable that the flag State would have to deposit a supplementary bond if the bond initially deposited proved to be insufficient. So, in order to achieve a well-balanced provision these cases should also be covered by document LOS/PCN/SCN.4/1988/CRP.29.

81. Another view was that reimbursement could not occur automatically. This view was supported in the Special Commission. It was recalled that under document LOS/PCN/SCN.4/1988/CRP.29 reimbursement is possible only according to the final judgement or award of the appropriate domestic forum. Other delegations preferred the wording of document LOS/PCN/SCN.4/1988/CRP.25, paragraph 4, to the effect that reimbursement is possible only if the purpose of the bond or security no longer exists.

82. Another subject of discussion was the formulation of the principle of reimbursement in the same means of payment as the one deposited by the flag State in document LOS/PCN/SCN.4/1988/CRP.29. The principle was objected to on the ground that the text was rather vague. It was argued in response that the proposal contained in document LOS/PCN/SCN.4/1988/CRP.29 left it open to deposit the bond in cash or other forms. This was also clear from the use of the term "endorsement" which was designed to cover those cases where no cash was deposited. The essential thing was that reimbursement would be made in the same mode of payment as the deposit.

83. Finally the discussion turned to the question whether the Tribunal had the competence at all to make such determinations as are necessary to ensure the endorsement or reimbursement of the bond as proposed in document LOS/PCN/SCN.4/1988/CRP.29. Those who questioned that competence felt that matters of domestic law were involved here, so that at best the Tribunal could make recommendations. In response to these doubts it was proposed to replace the phrase "as are necessary to ensure" by the words "for the".

84. The Special Commission could not agree on the proposal submitted in document LOS/PCN/SCN.4/1988/CRP.29. It was therefore decided that interested delegations would consult on that suggestion in order to find a solution that will be generally acceptable to the Special Commission.

85. The Special Commission concluded its examination of the revised draft rules concerning the prompt release of vessels and crews. It agreed, however, that after interested delegations would have arrived at generally acceptable formulations for the two pending suggestions contained in documents LOS/PCN/SCN.4/1988/CRP.29 and CRP.30, the Special Commission would take up those formulations for their approval and their inclusion in the revised draft rules.

86. In the course of the examination of the revised draft rules, a number of other proposals of a drafting nature were made which were submitted to the Secretariat in writing. They involved suggestions to bring the text of one language in line with the texts of the other languages and proposals designed to make the wording clearer

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without affecting the substance in any manner. Since this is a summary of the discussions, it is not possible to reflect every intervention fully or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and they will be taken into account in revising the text. The Chairman would appreciate being informed should any delegation feel that an important matter has been omitted in this summary.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Revised draft rules of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.2/Rev.1 (Part I))

Corrigendum

1. Page 3, paragraph 8, delete the third sentence, and substitute

In the light of the trend of discussions concerning the determination of the amount of the bond of other security, the delegations that had made the proposal did not insist on pursuing the matter any further.

2. Page 10, paragraph 60, line 1

Delete: Many delegations believed, however, and substitute Delegations concluded

3. Page 10

Renumber paragraph 60 as paragraph 61.

Renumber paragraph 61 as paragraph 60.

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THE LAW OF THE SEA
Special Commission 4
Sixth session
Kingston, Jamaica
14 March-8 April 1988

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany

1. The Special Commission had before it the draft of a Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany (LOS/PCN/SCN.4/WP.5 (Part I)), prepared by the Secretariat. The examination of the draft by the Special Commission was conducted in accordance with the following suggestions made by the Chairman which were based on recommendations of the Bureau:

(a) The draft was to be examined to determine whether it contained all the provisions required to ensure that the Tribunal would be in a position to exercise the functions entrusted to it under the United Nations Convention on the Law of the Sea, unhindered and under the best conditions possible in the host country. In particular, the Special Commission was to ascertain whether all the immunities, privileges and facilities needed for the work of the Tribunal, its members and staff were comprehensively and precisely reflected in the draft and whether the free access of the parties to a dispute before the Tribunal be they representatives of sovereign States, international organizations or juridical or natural persons, was fully ensured;

(b) In examining the draft the Special Commission was to concentrate on the substantive issues in the various articles while avoiding a discussion of drafting points, notwithstanding the fact that the draft consisted of fully formulated articles;

(c) In the light of the proposals expected to be put forward in the course of the discussion within the Special Commission, the Secretariat was to be requested to revise the draft. A final reading of that redraft would take place if after attending to its other business the Special Commission had time left for that purpose and if there was a need for such action, since the draft Headquarters Agreement would have to be presented for approval before the meeting of the States Parties in accordance with annex VI, article 4, of the Convention.

2. In introducing the draft Agreement, the Secretary of the Special Commission pointed to the explanatory note prefatory to that document. He emphasized in particular that the formulations agreed upon by the Special Commission should not be treated as final or unchangeable since the Tribunal would have the legal capacity and competence to contract and the ultimate Agreement would therefore be its responsibility.

3. Attention was also drawn to the fact that the draft was based on many precedents. It took account of recent United Nations practice and of headquarters agreements concluded wuthin the framework of the United Nations system.

4. Before taking up the draft, at the instance of one delegation the Special Commission considered the question as to whether the host country of the International Tribunal for the Law of the Sea should be mentioned by name in the draft Headquarters Agreement.

5. It was pointed out in the discussion that the country named in annex VI to the Convention as host country of the International Tribunal for the Law of the Sea had not as yet met the requirement laid down in paragraph 38 of the Final Act of the Third United Nations Conference on the Law of the Sea (A/CONF.62/121), so that the problem of the host country of the Tribunal was not yet completely solved. This had also been the subject of a letter dated 16 April 1987 from the Chairman of the Group of 77 to the Chairman of the Preparatory Commission (document LOS/PCN/85), which reflected the Group's concern over that fact. In view of that situation some delegations deemed it appropriate that in the draft the name of the host country should not appear for the time being, but that the term "host country" should be used.

6. Other delegations however drew attention to annex VI, article 1 (2), of the Convention, according to which the seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany. They felt that in preparing the draft Headquarters Agreement the Special Commission was not entitled to diverge from that provision. Therefore, the name of the host country as mentioned in the Convention should be included in the draft.

7. In conclusion, and taking account of the views expressed in the discussion, the Chairman of the Special Commission pointed out that the draft was a reflection of the provision contained in annex VI, article 1, paragraph 2, of the Convention. He also felt that the draft prepared by the Secretariat made reference to the requirement agreed upon by the Law of the Sea Conference when the decision concerning the seat of the Tribunal was taken (see LOS/PCN/SCN.4/WP.5 (Part I), p. 5). The Chairman stated that in discussing the draft the Special Commission

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would be fully aware of the problem relating to the seat of the Tribunal. The document prepared by the Special Commission would be submitted for approval to the meeting of States Parties to be held after the entry into force of the Convention. By that time the problem concerning the seat of the Tribunal would have been settled. The Chairman also informed the Special Commission that the draft was formulated in such a way that it could be negotiated with any State Party to the Convention. Therefore, if need be, the meeting of States Parties would not find it too difficult to make any corrections to the document that might become necessary.

8. Based on those understandings the Special Commission went along with the view that the name of the host country of the International Tribunal for the Law of the Sea as contained in annex VI to the Convention should be spelled out in the draft Headquarters Agreement.

9. Another point raised in the general discussion was the legal personality of the Tribunal. Some delegations argued that the Convention did not make provision for the legal capacity of the Tribunal to conclude treaties under international law. In that connection the views were expressed that it had the inherent capacity and that in any event the legal personality of the Tribunal would be covered by the Protocol/Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea which would be adopted by the States Parties to the Convention.

10. After this general exchange of views the Special Commission, on the recommendation of its bureau, began an article-by-article consideration of the draft. It was decided that the preamble would be taken up at the end of the discussion of the articles.

Article 1. Use of terms

11. At the outset the Secretary of the Special Commission pointed out that the terms contained in article 1 had been taken from the Convention itself, from the Statute of the Tribunal and from various headquarters agreements, e.g. those between the United Nations and the United States of America, the International Atomic Energy Agency (IAEA) and Austria, and the United Nations and Jamaica.

12. With reference to the substance of article 1, the question was raised as to why in subparagraph (c) dealing with "competent authorities" the courts of the Bund (Federal State) and of the Laender (States) were included.

13. In reply, the opinion was expressed that for federal States like the Federal Republic of Germany it was necessary for courts to be grouped among "competent authorities". Headquarters agreements between the United Nations and the United States of America and between IAEA and Austria also included the courts among the "competent authorities".

14. To improve the structure of subparagraph (c), the following wording was proposed:

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"(c) 'competent authorities' means such Bund (Federal State) and Laender (States) or local authorities in the Federal Republic of Germany in the context and in accordance with the laws and regulations of the Federal Republic of Germany including laws and customs of the State and local government involved as may be appropriate."

15. One delegation proposed the deletion of subparagraph (h) on the "headquarters district" on the ground that it was clearly defined in article 3 of the draft.

16. A number of delegations expressed the wish that article 1 would be taken up once again following the conclusion of the consideration of all the other articles of the draft.

Article 2. Legal personality of the Tribunal

17. In the discussion on this article it was recalled that the Law of the Sea Convention did not make provision for the legal personality of the Tribunal. In that connection attention was drawn to the discussion held as early as the third session of the Preparatory Commission on the need for the conclusion of a legal instrument concerning the privileges and immunities of the Tribunal outside the host country as well (see LOS/PCN/SCN.4/1985/CRP.8 and LOS/PCN/SCN.4/L.3, p. 2). Such a legal instrument, which would have to be concluded among States Parties to the Convention, should also recognize the legal personality of the Tribunal and should be in force before the Headquarters Agreement could be concluded.

18. Concerning the phrase "the Government recognizes the legal personality of the Tribunal", the following proposals were made:

(a) The word "Government" should be replaced by the words "Federal Republic of Germany" because the Headquarters Agreement was to take the form of a a treaty between the Tribunal and the Federal Republic of Germany rather than between the Tribunal and the Government of the Federal Republic of Germany. The Headquarters Agreement would have to deal with matters not only relating to the executive power but also involving the legislative power and jurisdiction. Thus, it would not be sufficient, for instance, if only the Government recognized the legal personality of the Tribunal. Such an obligation would have to apply also to the courts and the legislative bodies of the Federal Republic of Germany;

(b) Other delegations felt however that it was superfluous to have a provision to the effect that the Government of the host country recognized the legal personality of the Tribunal since such personality derived directly from the existence of the Tribunal. They argued that article 1 of the Statute of the Tribunal implied that the Tribunal had the necessary competence to conclude such treaties and contracts as were required for the effective conduct of its business and the discharge of its functions.

19. It was pointed out in the discussion that the Tribunal must have legal personality both in terms of international law, which was to be included in the legal instrument concerning privileges and immunities, and in terms of the domestic law of the host country, which was to be covered by the Headquarters Agreement.

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Article 2 referred to the legal personality of the Tribunal in the host country in terms of its domestic laws.

20. The following suggestion was made regarding the chapeau of article 2: "In accordance with its legal personality, the Tribunal shall have the capacity ...".

21. As regards subparagraph (b), some representatives favoured the deletion of the words "lease" and "hold" since the verbs "acquire" and "dispose" covered those concepts as well.

22. With reference to subparagraph (c), the proposal was made to use the words "to be a party to legal proceedings".

Article 3. The headquarters district

23. The Secretary of the Special Commission pointed out that basically the provisions of paragraphs 1, 2 and 4 were taken from the Headquarters Agreement between the United Nations and the United States.

24. With regard to paragraph 1, which provided for the seat of the Tribunal to be the headquarters district, some representatives pointed to the close connection between that provision and the definition of the term "headquarters district" in article 1 (h). They felt that in the light of that definition and the other provisions on the headquarters district in paragraphs 2 and 3 of article 3, paragraph 1 was superfluous and could be deleted. Other representatives opposed that deletion. They argued that the article was logical and clearly structured and that it was in line with corresponding provisions of headquarters agreements already in force.

25. The Special Commission then turned to subparagraph (b), according to which the headquarters district would comprise any other lands, buildings or parts of buildings which might from time to time be included therein by supplementary agreement. The view was expressed that the words "from time to time" were vague and should therefore be deleted without affecting the substance of the subparagraph.

26. However, the Secretary pointed out that that formula was in line with nternational treaty practice and created the possibility for the temporary acquisition or use of land or buildings.

27. The discussions on paragraph 3 centred on the nature of the Additional agreement referred to in that paragraph. The Special Commission agreed that the accord in question must have the character of an agreement of international law. It was therefore proposed that in the last line of that paragraph the words "competent authorities" should be replaced by the words "Federal Republic of Germany".

28. A number of representatives were of the view that paragraph 4 could be deleted. They argued that it was a matter of course that it would only be with the express consent of the Tribunal that the Tribunal could be dispossessed of the headquarters district.

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Article 4. Law and authority in the headquarters district

29. Article 4 is modelled on the corresponding provisions of similar agreements between the United Nations and the United States and the United Nations and Jamaica, respectively.

Paragraph 1

30. The view was expressed that the terms "control" and "authority" were too general and that it was not clear what areas those terms covered.

31. In response it was argued that the last phrase of the paragraph ("as provided in this Agreement".) made it sufficiently clear what was meant by "control" and "authority". It was suggested that the phrase "as provided in" be replaced by the phrase "in accordance with".

32. The Secretary pointed out that the terms "control" and "authority" were to be understood in a broad sense.

Paragraph 2

33. The suggestion was made to insert the words "in the view of the Tribunal" in the first sentence after the word "necessary", in order to make it clear that it was the Tribunal alone that could decide what its requirements were for the execution of its functions. Some representatives opposed that addition as superfluous.

34. A number of representatives held the view that paragraph 2 gave the Tribunal relatively wide competences with regard to the enactment of regulations. They felt that the provision in the first sentence of paragraph 2, which reads "The Tribunal shall have the power to make regulations ...", was too far-reaching, especially in view of the disputes settlement procedure envisaged in the fifth sentence of the paragraph. Under that provision the host country would have to respect the regulation of the Tribunal until a decision in the former's favour resulted from the application of that dispute settlement procedure. The following new wording was therefore proposed for the first sentence: "The Tribunal shall have the power to make regulations ... respects necessary to fulfil its official functions." It was also proposed that the fifth sentence of the paragraph be deleted.

35. Speaking against that proposal, a number of representatives opposed in particular the insertion of the word "official" in the first sentence. In so doing, they pointed to article 1 (3) of annex VI to the Convention which referred only to the "functions" of the Tribunal in general and did not draw any distinction between official and unofficial functions.

36. In a brief exchange of opinions on the second sentence, which stated that the Tribunal would from time to time inform the Government of regulations enacted, the view was expressed that the words "from time to time" should be deleted since the Government of the host country would in any case have to be kept informed of the regulations of the Tribunal.

37. Some representatives proposed changing the wording by inserting "thus" after the word "regulations" and replacing the phrase "from time to time" by the word "immediately".

38. Other proposals concerning the structure of paragraph 2 sought to turn the third, fourth and fifth sentences into separate paragraphs. Another suggestion was to have the fourth and fifth sentences as a new paragraph.

Paragraph 3

39. It was suggested that paragraph 3 be placed before paragraph 2. That suggestion was however opposed on the ground that paragraph 3 dealt only with the exceptions to the basic provisions contained in paragraph 2.

Paragraph 4

40. The proposal was made that the simpler formulation used in the headquarters agreement between the United Nations and Jamaica (art. 3, para. 3) should be used in that paragraph.

41. A few representatives were of the opinion that the paragraph should be deleted since its provisions were already covered in articles 5, 6 and 7. Others however wanted the paragraph retained. They also opposed the suggestion that the words "competent authorities" be replaced by the words "Federal Republic of Germany" and the words "and transactions" deleted, since the term "acts" also covered those transactions.

Article 5. Inviolability of the headquarters district

42. In introducing the article, the Secretary pointed out that its wording was mostly in line with the treaty practice of the United Nations, e.g. the headquarters agreements between the latter and the United States and Jamaica, respectively; between the United Nations Educational, Scientific and Cultural Organization (UNESCO) and France; and between IAEA and Austria. Paragraph 6 concerning the official delivery by the postal service followed international practice.

Paragraph 1

43. It was suggested that in order to make the provision contained in the paragraph as clear and unequivocal as possible the agreement referred to should be one that was clearly expressed. Another comment was that in both paragraphs 1 and 2 provisions should be made for the Acting President to give the agreement or consent required under that paragraph in the absence of the President.

44. One representative felt that the approval of the President required under paragraphs 1, 2 and 3 should always be expressed in the same terms.

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Paragraph 2

45. Some representatives raised the question as to the relationship between that paragraph and article 12, both of which, they felt, related to ownership rights. The Secretary explained that while article 5, paragraph 2, concerned private property article 12, on the other hand, covered problems relating to the property of the Tribunal.

46. In the view of several representatives, the formulation "Judicial actions and the executions of legal process" should be clarified with regard to what acts were actually meant by that formulation. They also stated that some thought should be given as to whether it was really necessary to make a separate reference to the seizure of private property.

Paragraph 3

47. There was an exchange of opinions on the question as to whether "express consent" should be required for entry into the headquarters district in case of fire or other disaster requiring prompt protective action and, if so, who should give it and in what manner. Essentially there were two different views, as presented below.

48. A number of representatives felt that under no circumstances should there be entry into the headquarters district without permission. They alluded to the possibility that illegal access to the headquarters district and the documents kept there may be obtained on the pretext of a disaster within the meaning of paragraph 3. That should be precluded at all events by clear-cut legal provisions to the effect that, in cases referred to in paragraph 3, the consent to enter into the headquarters district would have to be obtained either from the President, the Vice-President, the Registrar or from another responsible officer of the Tribunal.

49. In the view of some representatives the headquarters district of the Tribunal should be inviolable in the same manner as the premises of diplomatic missions under the Vienna Convention on Diplomatic Relations of 18 April 1961.

50. Other representatives stressed that in case of fire or other disaster immediate action should be called for in order to protect human health and life, as well as property. That prompt protective action must on no account be delayed by the requirement of consent. Accordingly, the suggestion was made to delete the phrase "if the President and the Registrar cannot be reached in time".

51. With reference to the basic provision on entry into the headquarters district as contained in paragraph 1, according to which only the President can give the necessary consent, attention was drawn to the fact that paragraph 3 gave that power also to the Registrar. The two paragraphs should be harmonized so that either the President or the President and the Registrar should be mentioned in both paragraphs.

52. The suggestion was also made to insert the words "emergency such as" after the words "In case of" to bring out the meaning more clearly that the paragraph was

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applicable not only in case of fire. That suggestion was objected to on the ground that the term "disaster" used in paragraph 3 took care of that problem.

Paragraph 4

53. To strengthen the provisions on the inviolability of the headquarters district, it was suggested that the provision be made subject to paragraph 1 also.

54. A few representatives wanted to see the word "may" replaced by the word "shall" in the first line of this paragraph, while others preferred the current wording. Those representatives pointed in that connection to article 8, paragraph 1, which, they felt, already provided for fire protection as a form of public service in the headquarters district. Another suggestion was to merge paragraphs 3 and 4 on the ground that both provisions related to emergency situations. One other representative suggested that the substance of paragraph 4 should be absorbed by article 7 ("Protection of the headquarters district") since paragraph 4 also related to the protection of the headquarters district.

Paragraph 5

55. It was felt that that paragraph should be referred to in the Protocol/Agreement. It was proposed that the legal hierarchy of the instruments mentioned in the paragraph should be as follows: "... the Convention, this Agreement and the Protocol/Agreement ..."

56. One representative favoured having paragraphs 5, 6 and 7 as a separate article on the ground that they were not concerned with the inviolability of the headquarters district.

Paragraph 6

57. An exchange of opinions took place on the relationship between the paragraph and article 8 according to which the competent authorities would endeavour to provide, among other things, public services to the Tribunal. A number of representatives felt that the official delivery by the postal service, in the headquarters district, of letters and documents pursuant to paragraph 6 was already taken care of by article 8 and that paragraph 6 could therefore be dropped.

58. Others believed, however, that there was a substantive difference between regular postal service envisaged in article 8 and an official delivery by the postal service as envisaged in paragraph 6 of that article. The paragraph should therefore be retained.

59. One representative favoured merging paragraph 6 with article 8.

60. There was a suggestion to replace the word "in" by the word "to" in the second line of paragraph 2 on the ground that under paragraph 6 letters and documents could be delivered only to the headquarters district since delivery in the headquarters district was the exclusive competence of the Tribunal.

Paragraph 7

61. Agreement was reached on the deletion of the words "or for other causes" in the first sentence since the Tribunal did not have competence to expel or exclude persons for causes other than violations of its regulations adopted under article 4 of the Headquarters Agreement.

62. It was agreed further to drop the second sentence of the paragraph since the subject-matter concerned was already dealt with in article 4, paragraphs 3 and 4.

Article 6. Vicinity of the headquarters district

63. It was suggested that the word "intended" be substituted for the word "required" in both paragraphs since that wording was considered to be better suited to the substance of the article. There were no strong objections to that suggestion even though attention was drawn to the fact that the original wording had been patterned on United Nations treaty practice (see the headquarters agreement between IAEA and Austria).

64. A number of representatives suggested moving article 6 to a different position. They argued that it was closely related to article 3 and should therefore follow right behind it. Another suggestion was to combine paragraph 2 of article 6, paragraphs 5 and 7 of article 5 and paragraph 1 of article 6 into a separate article which should immediately follow article 3.

Article 7. Protection of the headquarters district

Paragraph 1

65. The view was expressed from the beginning of the discussion on this article that since that provision imposed excessively heavy obligations on the host country it should be patterned more closely on the corresponding provision of the headquarters agreement between the United Nations and Jamaica (art. 3, para. 8). The following new text was therefore proposed:

> "The competent authorities shall exercise due diligence to ensure that the tranquillity of the headquarters district is not disturbed by the unauthorized entry of persons or groups of person from outside or by disturbances in the immediate vicinity of the headquarters district."

According to that proposal the remainder of paragraph 1 was to be deleted.

66. Other representatives favoured retaining the provision as contained in the draft since it closely followed the wording of the headquarters agreement between IAEA and Austria (art. IV, sect. II).

67. Another suggestion was to delete the phrase "or creating disturbances in the immediate vicinity of the headquarters district" and to move it into article 6. It was considered more appropriate to deal in a single article with all aspects of the vicinity of the headquarters district.

68. A further proposal was to remove the words "exercise due diligence to" from the first line in order to bring out more clearly the host country's obligation to protect the headquarters district. In opposing that proposal some delegations argued that the host country must have the necessary flexibility in protecting the headquarters district. For instance, the freedom of demonstration in the vicinity of the headquarters district was not be be curtailed. It was pointed out, however, that it was for the Tribunal to determine what a disturbance was.

69. Some of the proposals made were designed to make the language more precise. They were: (a) to delete the phrase "on the boundaries of the headquarters district" since protective measures might also become necessary at some distance from the headquarters district; (b) to retain, for the same reason, the original text of paragraph 1 but in the fifth line to insert the word "on" instead of the word "outside"; and (c) to delete the word "police" in the last line in order to allow for the widest possible range of measures to be taken for the protection of the headquarters district.

Paragraph 2

70. No comments were made on paragraph 2.

Paragraph 3

71. Under this paragraph notifications of requests by the President, under paragraph 2, may be made on his behalf by the Acting President in his absence or by any other duly authorized official of the Tribunal.

72. It was pointed out that provisions on notification are also found in other parts of the draft, e.g. in article 8, paragraph 5, and that to simplify matters these provisions should be combined in a single article which should form part of the final clauses. The persons entitled to make such notifications should be the same in all cases.

73. The Special Commission agreed to delete the words "in his absence" in the second line since it was a matter of course that the Acting President could make notifications only if the President was absent.

Article 8. Public services in the headquarters district

74. It was explained by the Secretary when introducing the article that it was in line with United Nations practice regarding headquarters agreements. Thus, paragraph 1 was patterned, among others, on the corresponding agreement between UNESCO and France and paragraphs 3 and 4 on the headquarters agreement between the United Nations and Jamaica. Paragraph 2, which follows closely the headquarters agreement between the United Nations and Jamaica, had been drafted in such a way as to adapt to the federal structure of the Federal Republic of Germany. There was no special precedent, however, where paragraph 5 was concerned.

Paragraph 1

75. The view was expressed that the paragraph was too detailed in listing the various kinds of public service. More general terms should therefore be used.

76. One representative felt that it was necessary to make it quite clear that those services would be rendered to the headquarters district permanently.

77. In order not to overburden the President of the Tribunal with technicalities, it was suggested that the words "the President of the Tribunal" be replaced by the words "a duly authorized official", which proposal was to apply also to paragraph 3.

78. The following additional suggestions were made:

(a) In the first line the word "endeavour" was to be deleted as not being sufficiently obligatory; alternatively, that word be replaced by the phrase "do their utmost to ensure", along the lines of the headquarters agreement between the International Maritime Satellite Organization (INMARSAT) and the United Kingdom of Great Britain and Northern Ireland;

(b) The phrase "within the limits of their competences" was to be deleted since that qualification was already made clear in article 1, subparagraph (c);

(c) The words "on equitable terms" in the second line were to be moved to the third line after the word "provide";

(d) The phrase "on equitable terms" was to be deleted since contracts signed on the rendering of those public services would ensure that they would be on equitable terms.

Paragraph 2

79. A number of representatives had problems with that provision, under which in case of interruption or threatened interruption of any such public services the competent authorities would consider the needs of the Tribunal as being of equal importance to those of the constitutional organs of the Free and Hanseatic City of Hamburg. Those representatives felt that in that respect the Tribunal should not only be on a par with the organs of the Free and Hanseatic City of Hamburg but should also be on a par with the constitutional organs of the Federal Republic of Germany as a whole. A comparable arrangement, they argued, was found in the headquarters agreement between the United Nations and the United States, which like the Federal Republic of Germany was a federal State.

80. It was also suggested that the paragraph should closely follow the wording of the headquarters agreement between IAEA and Austria. Therefore, in the last line the words "such services are reinstated as soon as possible" should be replaced by the formulation "the work of the Tribunal is not impaired".

Paragraph 3

81. One representative wanted the word "appropriate" in the second line deleted.

Paragraph 4

82. The Special Commission agreed that the reference in the last line should not only be to the local administrative authorities but should refer also to the federal and local administrative authorities, so as to ensure that the rates to be paid by the Tribunal would not exceed the lowest comparable rates accorded to all administrative authorites.

83. The suggestion was made that the paragraph should make it quite clear that the Tribunal would be exempt from taxes in respect of the payment of rates. That suggestion was however not taken up by other representatives, who argued that article 15 ("Exemption from taxation, customs charges and import or export restrictions") was also applicable to rates referred to in article 8.

Paragraph 5

84. The comments made regarding article 7, paragraph 3, also apply to paragraph 5.

Article 9. Official communications

85. Article 9 was patterned on the relevant passages of the headquarters agreements between the United Nations and Jamaica and between IAEA and Austria.

Paragraph 1

86. With reference to comments made on article 2 (see para. 18 (a) above), it was suggested that the word "Government" be replaced by the words "Federal Republic of Germany" in the first line.

87. In the course of an exchange of opinions on the advisability of using the formulation "shall secure the freedom of communication" instead of the phrase "shall secure the inviolability of all official communications" it was argued that the concept of "inviolability" was wide enough to subsume "freedom of communication". One representative preferred to see the word "inviolability" replaced by the word "immunity".

88. The proposal was made, and accepted, to delete the word "official" in the first line. That would ensure that all communications of the Tribunal were protected.

89. Some representatives wished to have the word "privacy" in the fifth line replaced by the word "confidentiality".

90. The Special Commission agreed to delete the phrase "immune from censorship and".

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Paragraph 2

91. No amendments were proposed for paragraph 2.

Paragraph 3

92. One representative indicated that the "supplementary agreement" mentioned in the paragraph, if it were to have any financial implications, would require for its conclusion authorisation from the meeting of States Parties just as was the case with the supplementary agreement referred to in paragraph 4.

93. The following new wording was proposed for the beginning of the paragraph: "If so requested by the President of the Tribunal the Federal Republic of Germany shall provide for the official purposes ..."

Paragraph 4

94. To simplify the chapeau of the paragraph, and arguing that an authorization from the meeting of States Parties may not be necessary, the following wording was proposed: "With the agreement of the Government, as may be included in a supplementary agreement, the Tribunal may also establish and operate in the headquarters district: ...". The suggestion was made to delete any reference to the authorization by the meeting of States Parties since it was quite possible that the need for the conclusion of a supplementary agreement pursuant to paragraph 4 would arise only after the conclusion of the meeting of States Parties to be convened in accordance with article 4, paragraph 4, of annex VI to the Convention. Attention was however drawn to the fact that the Convention did not preclude the possibility of having several meetings of States Parties, as envisaged in article 19, paragraph 1, of annex VI to the Convention. Therefore, paragraph 4 should be retained as currently worded.

Paragraph 5

95. It was suggested that because of its basic nature that provision should be placed at the beginning of article 9.

96. With reference to comments made regarding article 8, paragraph 4 (see para. 82 above), the proposal was made that in the fourth line both local and federal authorities should be mentioned.

Article 10. Freedom of publication

97. It was pointed out by the Secretary when introducing article 10 that those provisions, too, had been inspired by United Nations practice regarding headquarters agreements (see the headquarters agreement between IAEA and Austria, art. 4, sect. II).

98. A few representatives suggested the deletion of paragraph 2, under which the Tribunal would respect any laws and regulations of the Federal Republic of Germany as well as any international agreements to which the Federal Republic of Germany

was a party, relating to intellectual property rights. That provision was at variance with the character and specifics of the publications of the Tribunal. Besides, article 4, paragraph 3, of the draft took adequate care of intellectual property rights.

99. Those against the proposal argued that paragraph 2, which imposed obligations on the Tribunal, should be retained in order to balance the rights granted in paragraph 1. Alternatively, it was suggested that article 10 could be deleted in its entirety.

100. It was also suggested that paragraph 1 should be part of the provisions on prohibition of censorship and therefore be moved into article 9.

101. The following drafting change was proposed for paragraph 1:

> "The Tribunal shall have the right to publish and broadcast freely within the Federal Republic of Germany for purposes in conformity with the Convention and its Statute."

102. The Special Commission agreed to move paragraph 1 as proposed above into article 9 and to delete paragraph 2 of article 10.

Article 11. Flag and emblem

103. During the brief discussion on article 11, it was recalled that the Convention did not contain any stipulation concerning the flag and emblem of the Tribunal. A relevant decision would have to be taken by the meeting of the States Parties to be convened under article 4 of annex VI to the Convention.

Article 12. Property

104. Attention was drawn to the fact that similar provisions on matters of property were contained in most headquarters agreements concluded by the United Nations, e.g. in subparagraphs (a) and (b) of article 6 of the headquarters agreement between the United Nations and Jamaica.

105. To arrange the draft more logically it was suggested that article 12 should be placed after article 7, but that at any rate it should come before article 9.

Paragraph 1

106. The view was expressed that it should be made explicitly clear that any waiver should only be granted by the President. Therefore, the phrase "no waiver shall" should be replaced by the words "any waiver should be explicitly formulated by the President of the Tribunal and in any case shall not extend".

107. In view of the importance of a waiver under paragraph 1 for the Tribunal, the question was raised as to whether a written decision of the Tribunal on such a waiver would not be more appropriate in such cases.

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Paragraph 2

108. The view was expressed that the paragraph was superfluous since the concept of immunity envisaged in paragraph 1 was also applicable to situations provided for under paragraph 2.

109. Those opposed to the deletion of the paragraph argued that paragraphs 1 and 2 applied to different situations. While paragraph 1 referred to immunity from legal actions, paragraph 2 governed immunity from administrative and legislative enforcement action for which no waiver was possible.

110. To make it clear that the subject of the article was not only property of the Tribunal located inside the headquarters district but also that located outside the headquarters district, it was proposed that in both paragraphs after the words "wherever located" the words "in the Federal Republic of Germany" should be inserted.

Article 13. Archives

111. With regard to the terms "archives" and "all documents" in the first sentence, the question was raised as to what the scope of these terms was; did they include manuscripts and maps, for instance? To make sure that any kind of documents would enjoy the protection of article 13, it was suggested, along the lines of the headquarters agreement between the European Patent Organization and the Federal Republic of Germany, that the term "entire documents" be used.

112. Others argued that the term "archives" was to be understood within the meaning of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 8 April 1983.

113. At the end of the discussion the prevailing view was that the first sentence of article 13 should be formulated on the lines of article 24 of the Vienna Convention on Diplomatic Relations of 18 April 1961. (Article 24 reads as follows: "The archives and documents of the mission shall be inviolable at any time and wherever they may be.")

114. It was suggested that article 13 be divided into two paragraphs, with the first sentence becoming paragraph 2 and the second sentence paragraph 1. The proposal was opposed on the ground that since the first sentence contained a basic provision the structure of the article should not be changed.

Article 14. Social security and pension funds

115. In introducing the article, the Secretary pointed out that that provision would be of special significance to the Tribunal since the Members of the Tribunal and the staff might not have social security schemes. If there was no specific agreement on matters of social security and pension funds between the United Nations and the Tribunal, the Members of the Tribunal and the staff would not belong to the United Nations pension scheme.

116. The discussion on the article could not be completed because of lack of time, and discussion will be resumed at the sixth session.

Additional proposals

117. In the course of the article-by-article examination of the draft Headquarters Agreement, a number of other proposals of a drafting nature were made. They involved, above all, suggestions to bring the text of one language in line with the text of the other languages and proposals designed to make the wording clearer without affecting the substance in any manner. Since the present document is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The Secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. Should any delegation feel that an important matter has been omitted, the Chairman would appreciate being so informed.

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CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany (LOS/PCN/SCN.4/WP.5 (Parts I and II))

Article 14 - Social security and pension funds

The Special Commission continued its discussions of the draft Headquarters Agreement from the point at which it had stopped at the fifth session (see LOS/PCN/SCN.4/L.11, paras. 115 and 116).

During the resumed discussion of article 14, some delegations were of the view that the Tribunal should have its own social security scheme, while others felt that, in view of the small number of members of the Tribunal and staff, it was unlikely to do so.

Paragraph 1

It was pointed out that apart from the members and the officials, the Tribunal itself should be exempt from all compulsory contributions to the social security scheme of the host country. It was argued that the exemption from those contributions was necessary because, under the Federal Republic of Germany's social security laws, employers were also liable to make contributions to the social security scheme.

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It was suggested that, the words "for them" in the last line, be replaced by the words "providing adequate benefits for them in accordance with international practice," the States Parties having to decide on the interpretation of the term "adequate".

In response to an inquiry, the Secretary explained that the paragraph did not encompass the ad hoc members of the Tribunal since they only served for a limited period of time and there was therefore no need to include them.

A number of representatives were of the opinion that the phrase "in the event that they elect not to participate in such schemes" was superfluous and could be deleted. Others felt however that the phrase was justified. It was suggested that reference should be made to non-participation rather than to elect not to participate.

Paragraph 2

The view was expressed that the paragraph, under which voluntary participation in the national security scheme should be in accordance with the laws of the Federal Republic of Germany, be deleted as superfluous. Others felt however that that provision was needed because the immunities accorded to the members of the Tribunal and the staff included exemption from taxation. Such exemption could however not be claimed where a member of the Tribunal or a staff member elected to participate in the social security scheme of the Federal Republic of Germany.

Paragraph 3

No proposals were made with regard to paragraph 3.

Article 15 - Exemption from taxation, customs charges and import or export restrictions

In introducing the article, the Secretary explained that it was patterned on similar provisions of other headquarters agreements, for example the headquarters agreements concluded between the United Nations Educational, Scientific and Cultural Organization (UNESCO) and France, the International Atomic Energy Agency (IAEA) and Austria and some international organizations and the Federal Republic of Germany.

One delegation felt that in accordance with the subject-matter of the article, the word "charges" in the heading should be replaced by the word "duties".

Paragraph 1

The view was expressed that it was not justified to restrict the exemptions to goods imported for the official use of the Tribunal. It was suggested that reference to official activities or uses was superfluous and should be deleted since any use of goods by the Tribunal was of an official nature.

One representative preferred to see the first sentence divided into two, the first sentence dealing with taxation and the second with customs duties. The second sentence should regulate not only the exemption from all customs duties but also exemption from prohibitions and restrictions in respect of all imports and exports of goods.

One representative suggested combining the second and third sentences.

In the course of an exchange of views on the last sentence according to which motor vehicles belonging to or operated by the Tribunal should, on request, be exempted from motor vehicle tax, some representatives favoured reference to "notification" rather than "request" since there should be no discretion in allowing such exemptions once the host country was notified.

Others pointed to corresponding provisions existing in other headquarters agreements in support of maintaining the text as currently worded. The headquarters agreement between IAEA and Austria was given as an example. Another argument in favour of the existing wording was that a request was also necessary since it was the only way for the host country to know what motor vehicles belonged to the Tribunal and should be exempted from taxation. In the end there was agreement that the words "on request" in the last sentence be replaced by the words "upon notification".

Paragraph 2

A proposal put forward by one representative to delete the words "or duties" in the second and fourth lines since they could be interpreted to mean "customs duties", which were already covered by paragraph 1, was opposed.

The view was expressed that paragraph 2 should be more explicit in expressing the obligation of the host country to provide the reimbursement mentioned in the first sentence. The following wording was suggested for that sentence: "In the purchase of goods or services necessary for the official activities of the Tribunal, when the price of such goods or services includes taxes or duties, the Federal Republic of Germany shall grant exemption from such taxes or duties or provide for their reimbursement."

The Special Commission agreed to rearrange the paragraph so that each sentence would form a separate paragraph.

Paragraph 3

The Special Commission accepted a proposal to amend paragraph 3 by introducing the following sentence: "In particular it is understood that no exemption from taxes will be claimed which are in fact no more than charges for public utility services". That proposal followed a corresponding formulation in section 9 of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, of 21 November 1947.

Paragraph 4

The suggestion to delete the words "imposed by the competent authorities" in the final sentence was supported by a number of representatives.

One representative proposed the following amendment for the second sentence: "... on the understanding that similar charges are imposed on such officials by the rules regulating their status." Other representatives opposed the proposal and were of the view that all officials of the Tribunal be exempt from taxation not only by the host country but also by other authorities.

Article 16 - Freedom from currency restrictions

Article 16, which in essence constitutes a general safeguard clause, follows corresponding provisions contained in the headquarters agreements between IAEA and Austria, UNESCO and France and the International Labour Organisation (ILO) and Switzerland.

While no substantive proposals were made in respect of this article, attention was drawn to the need for harmonizing the text in the various languages.

The discussion of article 16 marked the completion of the consideration of document LOS/PCN/SCN.4/WP.5 (Part I). The remaining draft articles are contained in document LOS/PCN/SCN.4/WP.5 (Part II).

Article 17 - Privileges, immunities, facilities and prerogatives of members and officials

In introducing the article, the Secretary explained that its provisions were largely patterned on available precedents such as the Convention on the Privileges and Immunities of the United Nations, of 13 February 1946, United Nations General Assembly resolution 90 (I), of 11 December 1946, on the privileges and immunities of members of the International Court of Justice, the practice of the Court (i.e. the exchange of letters between the President of the Court and the Minister for Foreign Affairs of the Netherlands recording an agreement between the Court and the Netherlands relating to privileges and immunities of members of the Court, the Registrar, officials of the Registry, assessors, the agents and counsel of the Parties and of witnesses and experts, dated 26 June 1946).

Paragraph 1

Referring to the above-mentioned exchange of letters, one representative felt that paragraph 1 did not consistently follow that precedent. He argued that by virtue of the exchange of letters, the members of the International Court of Justice, the Deputy Registrar and the other officials of the Court were only in a general way accorded the same treatment as corresponding categories of diplomats (see appendix to the letters, para. 1). In contrast, article 17, paragraph 1, made no reference to such equal treatment in a general way. It was pointed out that in State practice the treatment of diplomats was governed by the principle of reciprocity. That principle was not applicable, however, to the treatment of officials of international organizations or institutions. It was therefore proposed that the words "in general" or "in a general way" should be included in subparagraphs (a), (b) and (c).

Attention was drawn to the necessity of analysing, apart from the above-mentioned precedents, the abundant available practice of international organizations in the treatment of privileges and immunities with a view to further specifying those privileges and immunities that were to be granted to officials of the Tribunal. Several representatives felt, however, that a clear distinction between the various categories of persons listed in article 17 and between different ways of treatment arising therefrom would be possible only after the staffing structure regulations of the Tribunal have been elaborated.

On the other hand, some representatives doubted that the categorization of persons and the determination of different ways of treatment for them as attempted in subparagraphs (a), (b) and (c) were meaningful since in diplomatic practice there was hardly any substantial difference in respect of the scope of the privileges and immunities accorded to diplomats accredited in a given State. It was merely with regard to the facilities and prerogatives to be accorded that, in practice, distinctions were drawn between the ranks of diplomatic representatives. For example, the quantity of certain goods a diplomat was allowed to import tax-free often depended on his or her rank (such as the import of cars into the host country).

Another suggestion was to delete, in the third sentence of subparagraph (a), the words "or any other official" on the ground that the exchange of letters (appendix, subpara. 1 (a)) used as precedent did not contain a corresponding formulation in respect of the privileges, immunities and facilities of the Registrar of the International Court of Justice.

Reference was made to subparagraphs (a) and (b) under which, among other things, the treatment of the persons mentioned therein should include privileges, immunities, facilities and prerogatives in accordance with the Vienna Convention on Diplomatic Relations. Some representatives pointed out that the Vienna Convention did not provide for prerogatives. It was not imperative, therefore, that the draft Headquarters Agreement under consideration should make provision for such prerogatives. That view was supported with the argument that the category "prerogatives" was not firmly established in contemporary international law and was relevant only for the different treatment of diplomats in terms of the diplomatic protocol.

Other representatives opposed the deletion of the term "prerogatives" from article 17 on the ground that there was clear precedent for that term in the above-mentioned United Nations General Assembly resolution 90 (I) and in the exchange of letters.

As a result of the discussion a compromise proposal was accepted to divide the article into two separate articles, one dealing exclusively with privileges and immunities and the other dealing with facilities and prerogatives.

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To simplify the drafting of paragraph 1 it was suggested to move the reference to the Vienna Convention on Diplomatic Relations contained in subparagraphs (a), (b) and (c) to the chapeau of the paragraph.

One representative opposed any reference to the Vienna Convention on Diplomatic Relations in the draft Headquarters Agreement. Other representatives favoured retaining that reference on the ground that the provisions of the Vienna Convention on Diplomatic Relations were being broadly applied in international practice and constituted generally recognized international law.

Paragraph 2

Several representatives recommended that paragraph 2, which regulates the treatment of spouses and unmarried children of members of the Tribunal, the Registrar and the officials of the Tribunal and of their domestic staff, should correspond to the relevant provisions of the Vienna Convention on Diplomatic Relations. In particular, the provisions of the paragraph on domestic staff were to be brought into line with the Vienna Convention.

It was further suggested to add the phrase "in the host country" at the end of the first sentence. That would make it possible for members of the family of officials to be employed with the Tribunal.

Paragraph 3

To make the provision in paragraph 3 more clear and precise, it was suggested to replace the phrase "the same treatment" by the formulation "the treatment provided for in this article".

Paragraph 4

Paragraph 4 provides for immunity from legal process in respect of words spoken and written and all acts done by the members and the officials of the Tribunal in the discharge of their duties even when they are no longer engaged in the business of the Tribunal. The Secretary pointed out that there had already been earlier in the Special Commission general agreement on the need for such a provision (see LOS/PCN/SCN.4/L.9, para. 7).

One representative felt that the paragraph should be drafted in more general terms in order to ensure that immunity from legal process would also apply to acts other than those expressly listed in the paragraph. That view was opposed with the argument that a limitation to the listed acts in the discharge of duties was customary international practice.

Article 18 - Ad hoc members and experts appointed under article 289 of the Convention

One representative was of the view that it was inappropriate to extend the privileges, immunities, facilities and prerogatives to the families and domestic staff of ad hoc members and experts, since the periods of assignment of those categories of persons would be very limited and that there was therefore no need for their families and domestic staff to enter the host country of the Tribunal.

That point of view was opposed by others who argued that disputes might well be pending before the Tribunal for quite some time, so that the entry into the host country of the families and domestic staff of ad hoc members and experts could not be ruled out. In such cases those persons, too, should enjoy the protection of article 18. The article should therefore not be changed.

Article 19 - Agents, counsel and advocates before the Tribunal

Under article 19 agents, counsel and advocates representing parties to proceedings before the Tribunal shall be accorded the privileges, immunities and facilities necessary for the independent exercise of their duties.

The Special Commission had an exchange of views on the question of whether or not all parties to proceedings before the Tribunal should be accorded the same privileges, immunities and facilities, irrespective of whether they were States or entities other than States. Some representatives felt that in accordance with the principles of non-discrimination and equal treatment, all parties should enjoy the same privileges, immunities and facilities. Other representatives, in opposing that view, argued that, in proceedings before the Tribunal, States parties to the Convention and the persons representing them had to be accorded privileges, immunities and facilities in accordance with the Vienna Convention on Diplomatic Relations and other generally recognized rules of international law. On account of the nature and personality of States and international law, it was neither possible nor admissible to place natural and juridical persons, which were subjects of domestic law, on the same level. They felt that the provision of article 19, paragraph 1 of the draft, which states that agents, counsel and advocates representing parties to proceedings before the Tribunal shall be accorded the privileges, immunities and facilities necessary for the independent exercise of their duties, did not mean that States or intergovernmental organizations would have to forgo their rights as subjects of international law or that entities other than States parties would have to be treated as subjects of international law where proceedings before the Tribunal were concerned.

In the end, there was broad support for the view that there should be a provision defining those privileges, immunities and facilities that are required for the independent exercise of the duties of agents, counsel and advocates of any party to proceedings before the Tribunal. However, that provision, which should contain the minimum needed for all parties to proceedings before the Tribunal, should be without prejudice to the diplomatic privileges, immunities and facilities accorded to representatives of States and intergovernmental organizations in accordance with generally recognized rules of international law.

One representative further suggested that there should also be a provision on the privileges, immunities and facilities that should be accorded to natural persons appearing as parties to proceedings before the Tribunal. Another representative made the proposal that provision should also be made for privileges, immunities and facilities to be accorded to sponsoring States taking part in proceedings before the Tribunal under article 190 of the Convention.

A number of representatives were of the view that in line with the basic structure of annex VI, article 20, to the Convention, paragraph 1 of article 19 should first regulate the treatment of agents, counsel and advocates of States parties. A second paragraph of the article or a separate article 19 bis should then deal with the privileges, immunities and facilities of agents, counsel and advocates representing entities other than States parties before the Tribunal. It was suggested to pattern that provision on the Convention on the Privileges and Immunities of the United Nations, dated 13 February 1946 (section 22 - Experts on missions for the United Nations).

One representative considered it unnecessary for representatives of entities other than States parties to have the right to receive papers or correspondence by courier or in sealed bags. That representative felt that the Rules of the Court of Human Rights of the European Economic Community were a suitable precedent for the treatment of agents, counsel and advocates representing parties other than States parties.

In addition, the following proposals were put forward concerning the various paragraphs of article 19:

Paragraph 1

The proposal was made to bring the first two lines into harmony with article 50 of the draft Rules of the Tribunal (LOS/PCN/SCN.4/WP.2/Rev.1/Part I) and to begin paragraph 1 as follows: "Agents representing a party to proceedings before the Tribunal as well as counsel and advocates appearing before the Tribunal shall, ...".

Another representative suggested that the words "subject to the relevant rules of the Tribunal" be deleted in the first sentence. It was also argued in support of that proposal that the corresponding provision of United Nations General Assembly resolution 90 (I), of 11 December 1946, i.e. subparagraph 5 (a) (i), did not make reference to the rules of the International Court of Justice.

It was recommended, with reference to footnote 2, that the Registrar of the Tribunal not be given too far-reaching rights with regard to the practical implementation of article 19. The rights of parties to proceedings before the Tribunal should not be curtailed by decisions to be made by the Registrar.

In response to that view, it was pointed out that there was a need in the Rules of the Tribunal for some provisions dealing with the duties of the Registrar in conveying the necessary information to the competent authorities of the host country upon the arrival and sojourn in the host country of agents, counsel and advocates of parties appearing in proceedings before the Tribunal.

Subparagraph (a)

It was suggested to include in the subparagraph a reference to immunity from seizure of their personal baggage. In this connection reference was made to section 11, paragraph (a) of the Convention on the Privileges and Immunities of the United Nations.

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One representative had proposed earlier that the subparagraph also provide for immunity from the penal jurisdiction of the host country.

Subparagraph (b)

No specific comments were addressed to the subparagraph.

Subparagraph (c)

Referring to section 22, paragraph (c) of the Convention on the Privileges and Immunities of the United Nations, the view was expressed that the inviolability of all papers and documents be also ensured. Therefore, the word "official" should be replaced by the word "all" and the phrase "relevant to the exercise of their functions" be deleted. Some representatives favoured retaining subparagraph (c) as currently worded.

Subparagraph (d)

In the view of one representative it was necessary to look into the possible inclusion of the right to use codes.

Another representative felt that the right granted in the subparagraph could not be extended to include natural or juridical persons parties to proceedings before the Tribunal.

One representative suggested an additional subparagraph which, in accordance with article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations, would stipulate that agents, counsel and advocates be accorded the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Subparagraph (e) and (f)

No comment was specificially made in connection with subparagraphs (e) and (f).

Paragraph 2

One representative felt that the formulation "in accordance with the relevant resolutions, conventions and practice" was too general and imprecise and should therefore be worded in more specific terms.

Paragraph 3

The suggestion was made that paragraph 3, under which the provisions of paragraph 2 shall be applicable irrespective of the relations existing between the Governments of such representatives and of the host country, should apply not only to paragraph 2 of article 19 but to all the categories of persons mentioned in articles 17 to 20, so as to ensure the broadest possible effect. It was also suggested to introduce a new article 20 bis containing that provision.

Article 20 - Witnesses, experts and persons performing missions

With reference to the discussion on article 19, one representative proposed that a distinction also be made in article 20 between witnesses, experts and persons performing missions in the interest of States parties on the one hand, and witnesses, experts and persons appearing in the interest of parties to a dispute other than States parties on the other. That provision could possibly also be included in article 19. However, that was opposed by other representatives.

Another suggestion was to delete in the first sentence the phrase "subject to the relevant rules of the Tribunal". Other representatives preferred the article as drafted.

Article 21 - Waiver

In introducing the article, which deals with the waiver of privileges and immunities, the Secretary pointed out that subparagraph 5 (b) of United Nations General Assembly resolution 90 (I) and article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations had served as precedents in drafting that provision.

Paragraph 1

A number of representatives felt that paragraph 1 was superfluous since its subject was a matter of course. Opposing that view, other representatives drew attention to the fact that the paragraph in essence could be found in numerous other treaties providing for privileges and immunities related to the functions of these privileges and immunities and was therefore necessary. It was suggested to have the paragraph as a separate article.

The proposals made on the wording of the paragraph included the following:

On the ground that what the term "functions" in the third line referred to was not fully clear, one representative proposed that the function should be cross-referred to the persons covered under articles 17 to 20.

Contradicting that view, other representatives argued that the paragraph was drafted taking into consideration well-established practice and therefore the word "official" should be retained.

It was also argued that, in accordance with the wording of articles 17 and 18, it was necessary for the paragraph to deal also with facilities and prerogatives.

Paragraph 2

There was discussion on whether, in addition to the right to waive immunities, the Tribunal should also have a duty to do so.

Those representatives who were in favour of retaining the paragraph as drafted referred to subparagraph 5 (b) of the United Nations General Assembly resolution

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90 (I) and to article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations. Those who were against argued that the cited precedents were outdated and could not serve as the only basis. They could neither accept a right nor a duty of the Tribunal to waive immunities of representatives of States (subparas. (a) (iii) and (b)). Such a function could at best be left to the States whose representatives enjoy the privileges and immunities.

Another point in the discussion was the need to distinguish between the waiver of immunities with regard to diplomatic and non-diplomatic representatives of States. While one representative favoured such a distinction, several others opposed it. They therefore suggested deleting the word "diplomatic" in subparagraphs (a) (iii) and (b).

It was emphasized that only the sending State should be allowed to decide on the waiver of immunities. This principle is found in articles 30 and 32 of the Vienna Convention on Diplomatic Relations and should therefore not be disregarded.

For the benefit of a more systematic approach to those provisions and to take account of the distinction to be made between representatives of States and persons not representing States, the Special Commission agreed to take the question of the waiver of immunities with regard to representatives of States (subparas. (a) (iii) and (b)) out of the article and to deal with it in a separate article.

There was a detailed discussion on the chapeau of paragraph 2 which provides for the conditions under which immunities shall be waived. In the end the Special Commission agreed to formulate the chapeau on the lines of the Convention on the Privileges and Immunities of the United Nations (article IV, section 14, second sentence). Accordingly, immunities can only be waived if they impede the course of justice and if they can be waived without prejudice to the purpose for which they are accorded.

The view was expressed that the decision on the waiver of immunities concerning the Registrar and the experts should be taken by a qualified majority of the members of the Tribunal. It was proposed that such a decision could be taken by a two-third majority of the Tribunal, or if it was not sitting, by the unanimous decision of the available members.

One representative felt that in deciding on that question, account should be taken of the provision of article 29, paragraph 1 of annex VI to the Convention to the effect that all questions shall be decided by a majority of the members of the Tribunal who are present.

Several representatives opposed the power being given to a unanimous decision of the available members since this could give rise to a situation where a decision would be taken by a very small number of members, which would not be acceptable.

One representative argued that the waiver of immunities was an internal affair of the Tribunal or of the sending State of the representative concerned and that there was therefore no reason why such cases should be covered by a headquarters

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agreement. In response, it was pointed out that since it was for the host country of the Tribunal to accord privileges and immunities, the concrete conditions of their waiver must be agreed upon in the headquarters agreement.

A number of representatives proposed that the waiver of the immunities in respect of representatives of the States be dealt with in a separate article.

One representative was of the view that article 21 could remain as drafted by the secretariat.

Article 22 - Laissez-passer, notifications, identity cards

Article 22 deals, among other things, with the recognition of the laissez-passer issued by the Tribunal to its members, its Registrar and its officials and the granting of visas by the host country. In introducing the article, the Secretary pointed out that the wording basically followed paraagraph 6 of United Nations General Assembly resolution 90 (I).

In view of the fact that the number of persons covered by subparagraph 1 (a) would be relatively small, there was general agreement in the Special Commission that it might not be appropriate for the Tribunal to issue a laissez-passer of its own. That should be examined in the context of a relationship agreement between the Tribunal and the United Nations for the laissez-passer of the United Nations to apply in the case of the Tribunal. It was further argued that the specialized agencies of the United Nations also used the United Nations laissez-passer for their officials. However, pending a final decision in the matter, the existing provisions of subparagraph 1 (a) should be retained as a basis for the negotiations with the host country.

Paragraph 1

It was suggested, with reference to article 1 of the draft Headquarters Agreement (use of terms) which in subparagraph (j) regulates the use of the term "officials of the Tribunal", that the words "the Registrar" in the third line be deleted.

Paragraph 2

With regard to the duty of the Registrar to notify the competent authorities concerning the persons referred to in paragraph 2, one representative pointed out that the information to be transmitted should be as precise as possible. That could be done, for instance, along the lines of paragraph 3 of the article.

Paragraph 3

Under paragraph 3, among other things, persons referred to in articles 18 to 20 are to be furnished with a forge-proof identity card. This includes persons who might stay in the host country only for a short time, for whom a simplified identity card could be issued to avoid the relatively high costs involved in printing.

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It was proposed that the paragraph should follow immediately after paragraph 1 and that paragraph 2 should become paragraph 3 because of the close relationship of the subject matter in paragraphs 1 and 3.

Paragraph 4

No suggestions were made on the paragraph.

Article 23 - Entry, transit and sojourn in the host country

In introducing article 23, the Secretary pointed out that the headquarters agreement between IAEA and Austria (article 11, section 27) had served as precedent in drafting the article.

Paragraph 1

The view was expressed that paragraph 1 was too restrictive and that the obligations of the host country should be widened. Consequently, it should specify that the host country would ensure the necessary security at all times, not only when in transit. Another view was that the question of security during transit should be provided for in the general Convention/Protocol on Privileges and Immunities.

Others, however, felt that the paragraph should remain as drafted.

To improve the structure of the paragraph, it was suggested to have the first sentence as a separate paragraph since it only deals with the entry into and sojourn in the Federal Republic of Germany. The second sentence, which concerns questions of transit, was to form another paragraph.

Paragraph 2

Paragraph 2 stipulates that the provisions of paragraph 1 shall not apply in cases of general interruptions of transportation in the host country.

Several representatives were of the opinion that in such cases the competent authorities had a special responsibility to ensure transportation with a view to facilitating the entry into and sojourn in the Federal Republic of Germany of persons referred to in articles 17 to 20 as well as their transit to and from the headquarters seat. It was therefore proposed that the paragraph be deleted.

Another proposal was to delete only the last portion of paragraph 2 ("... and shall not ... means of transportation.")

Some representatives, however, felt that the paragraph should not be changed because many headquarters agreements contain similar provisions.

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Paragraph 3

Under paragraph 3, visas which may be required by persons referred to in paragraph 1 shall be granted as promptly as possible and without charge. Attention was drawn to the great importance of promptness in the issuance of visas to persons appearing in proceedings before the Tribunal, notably as regards observance of the time-limits prescribed for, and the exercise of the rights of parties to participate in such proceedings.

To simplify the formulation, it was suggested that rather than the cross-reference to persons referred to in paragraph 1, a direct reference should be made to those mentioned in articles 17 to 20. A similar change was suggested for paragraph 4.

Another opinion was that the paragraph should not be changed.

Paragraph 4

One representative felt that paragraph 4 was superfluous since it was similar in content to paragraph 1.

Paragraph 5

No comments were made on the paragraph.

Paragraph 6

Under paragraph 6, the Federal Republic of Germany reserves the right to take, with the approval of the President of the Tribunal, such precautionary measures as may be necessary in the interest of its security or for the maintenance of public order.

Some representatives expressed the view that in cases where security of the host country was involved, the approval of the President of the Tribunal should not be required nor could it be waited for in all situations.

Other representatives felt that the measures provided for in the paragraph could only be taken with the approval of the President of the Tribunal.

In the end it was agreed that the paragraph should be reworded along the lines of other headquarters agreements and that it should become a separate article. Guidance might be taken from the headquarters agreements between the International Civil Aviation Organization (ICAO) and Canada and between the World Health Organization (WHO) and Switzerland.

Article 24 - Nationals and residents of the host country

The article deals with the treatment of members and officials of the Tribunal who are nationals or residents of the host country. The Secretary explained that its provisions were formulated in accordance with the practice of the International

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Court of Justice (see the exchange of letters between the President of the Court and the Minister for Foreign Affairs of the Netherlands dated 26 June 1946, appendix, para. 2).

Paragraph 1

Attention was drawn to the fact that the provision in paragraph 1 did not entirely follow the precedent of the International Court of Justice since the exchange of letters (appendix, para. 1) contained a provision to the effect that the privileges, immunities, facilities and prerogatives only applied to members and staff of the Court who are not of Dutch nationality. By contrast the draft Headquarters Agreement did not provide for the exclusion of the nationals and residents of the host country from the privileges and immunities referred to in articles 17 to 20 which were to be accorded in connection with the activities of the Tribunal. Such a provision was, however, needed and that would also be in accordance with the Vienna Convention on Diplomatic Relations (article 37, paragraph 1).

One representative suggested that rather than referring to official capacity, reference be made to the exercise of official functions, for greater precision.

Several representatives considered the paragraph to be well balanced and not requiring any change. Besides, it was not clear at that stage whether or not the host country intended to accord to its nationals and residents the privileges and immunities provided for in articles 17 to 20, in which case the paragraph proposed would be superfluous.

Paragraph 2

As proposed earlier regarding the second sentence, a cross-reference should be made to article 15 under which the exemption is granted.

Article 25 - Responsibility, liability, insurance

The Secretary explained that article 25 was in line with international practice in the field. Paragraph 1 had basically been formulated on the lines of the headquarters agreement between IAEA and Austria.

Paragraph 1

No comments were made on the paragraph.

Paragraph 2

There was general agreement, following an exchange of views on the paragraph, to make no changes. It was suggested that, in the second line, the word "may" could possibly be replaced by the word "shall", in which event it would be the responsibility of the host country to ensure that the Tribunal could secure insurance coverage at reasonable rates.

Article 26 - Co-operation with the competent authorities

The Secretary pointed out that the provision in article 26 was designed to help prevent the abuse of privileges, immunities and facilities. The headquarters agreement between the United Nations and Switzerland (article 5, section 18) served as precedent.

The discussion showed that there were two basic approaches to the substance of the obligation to co-operate with a view to preventing any abuse in connection with the privileges, immunities and facilities. Several representatives favoured a broad formulation that would not limit the co-operation between the Tribunal and the competent authorities to cases of abuse by officials. They felt that the article should also apply to experts appointed under article 289 of the Convention, witnesses, experts and persons performing missions by order of the Tribunal as well as to agents, counsel and advocates of parties to disputes appearing in proceedings before the Tribunal. Moreover, it should be examined whether or not the provision should also encompass ad hoc members. As a result of those considerations, it was suggested to delete the words "of officials of the Tribunal provided for in article 17" at the end of the article and to replace them by the phrase "provided for in this agreement".

Other representatives, however, felt that the article should not be changed since it reflected extensive and tested practice. It was argued that co-operation between the Tribunal and the competent authorities was meaningful only in respect of those persons whose privileges and immunities the Tribunal was entitled to waive under article 21 of the draft Headquarters Agreement. With regard to members, ad hoc members and representatives of States, the Tribunal was not empowered to make such waiver. It was therefore neither justified nor appropriate to extend the article to include those persons.

In response, it was argued that the concept of co-operation could be interpreted broadly enough to be applicable to cases where the Tribunal itself could make no waiver. Another suggestion was to clarify that the Tribunal's responsibility should only be to the extent that it had the authority to prevent abuses.

In the end it was proposed that the article be reworded to the effect that it would cover the officials, experts appointed under article 289, experts and persons performing missions but would not cover representatives of States and the members and ad hoc members of the Tribunal. In respect of those persons whose immunity the Tribunal could not waive, it should co-operate with the host country to the extent of its authority and influence.

Some representatives suggested looking into the possibility of including a provision in the draft Headquarters Agreement to cover cases where abuse of privileges, immunities and facilities did in fact occur. They drew attention to corresponding precedent in the headquarters agreements between UNESCO and France, the United Nations and Japan and in the Convention on the Privileges and Immunities of the Specialized Agencies, of 21 November 1947, which in such cases provide for consultations with the host country.

In response to that proposal the view was expressed that the concept of co-operation under article 26 was broad enough to cover also such situations.

Another suggestion was to replace, in the first line, the word "appropriate" by the word "competent" in accordance with article 1 (c) (use of terms) of the draft Headquarters Agreement.

Article 27 - Supplemental agreements

The Secretary pointed out that there was provision for supplemental agreements in many headquarters agreements which served as precedents for article 27. The discussion focused on the question as to whether or not those supplementary agreements which have financial implications require the approval of the Meeting of States Parties since the budget of the Tribunal was provided by the States Parties to the Convention and the Sea-Bed Authority. There was agreement that the problem would have to be taken into account in drawing up the financial rules of the Tribunal.

Another view was that the article was worded too vaguely, and that supplemental agreements could be concluded only when necessary.

Article 28 - Settlement of disputes

The Convention on the Privileges and Immunities of the Specialized Agencies and the headquarters agreements between UNESCO and France and between the United Nations and Japan served as precedents for the provisions in article 28.

Paragraph 1

The paragraph deals with the relationship between the bilateral headquarters agreement and the multilateral protocol/agreement conferring privileges and immunities on the Tribunal. Such protocol/agreement would prevail in case of conflict with the headquarters agreement.

There was agreement that the paragraph should be taken out of article 28 since its subject-matter was different from that of paragraphs 2 and 3. Paragraph 1 should either become an additional paragraph of article 27 or form a separate article. The heading of such an article might read as follows: "Application of the relevant agreements on the privileges and immunities of the Tribunal regarding the host country".

Several representatives were of the view that, contrary to the draft Headquarters Agreement, in case of conflict between the provisions of such protocol/agreement and the provisions of the headquarters agreement, the latter should prevail. One representative felt however that on account of its multilateral character, the protocol/agreement should prevail. Another view was that neither should prevail.

It was agreed to come back to the paragraph once the draft protocol/agreement had been considered.

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Paragraph 2

The Special Commission reached agreement to shorten the chapeau by deleting the opening phrase so that the paragraph would read as follows: "The Tribunal shall make suitable provision for the satisfactory settlement of:".

With regard to the specifics of the procedure for the settlement of disputes of the kind listed in subparagraphs (a) and (b), the view was expressed that those provisions should not be too detailed. The Tribunal itself should decide on the most appropriate dispute settlement procedure.

One representative was, however, of the view that in disputes arising out of contracts and disputes of a private law character under subparagraph (a), the relevant ILO provisions would be appropriate. Guidance could also be found in the agreement between the International Rubber Organization and Malaysia.

With reference to subparagraph (b), in disputes involving any official of the Tribunal who by reason of his official position enjoys immunity, a more general language could be used so that persons under article 17 would also be covered.

Paragraph 3

Under paragraph 3, certain kinds of disputes between the Tribunal and the Government of the host country which are not settled by negotiation or other agreed mode of settlement shall be referred for final decision to a panel of three arbitrators.

For the benefit of greater clarity and consistency it was suggested that either party should be able to submit the dispute to arbitration which should be compulsory and binding, similar to the provisions of article 286 of the Convention.

Final provisions

The present provisions are patterned on the headquarters agreement between the United Nations and Switzerland.

There was agreement that the final provisions should constitute a separate article. Besides, the suggestion was made that the first and second sentences of the final provisions should each become a separate article since they dealt with two different subject-matters.

The representative of the Federal Republic of Germany drew attention to the fact that for the entry into force of the headquarters agreement for the host country, certain constitutional requirements must be met, and that the headquarters agreement could not enter into force upon its signature. That representative suggested two alternatives:

(a) Either the agreement could enter into force one month after the date on which the Government has notified the Tribunal that its national constitutional requirements have been fulfilled; or

(b) The agreement could enter into force 30 days after its signature on behalf of the Government and on behalf of the Tribunal.

Several representatives expressed a preference for the second alternative proposal. Others considered both proposals equally acceptable. A final decision should be left to the final negotiation between the Tribunal and the host country.

In response to the second alternative proposal, the suggestion was made to include in the final provisions a clause on the provisional application of the headquarters agreement following it signature. That suggestion met with general approval.

With reference to the second sentence of the final provisions to the effect that the provisions of the headquarters agreement may only be modified by agreement between the Tribunal and the Government, attention was drawn to the need for a clear provision as to the person authorized on the part of the Tribunal to agree on such modifications with the Government of the host country. The suggestion that this question should be settled in the context of the elaboration of internal administrative rules of the Tribunal under annex VI, article 16 to the Convention was favourably received.

The opinion was expressed that substantive modifications of the headquarters agreement would require the approval of the Meeting of States Parties.

In accordance with a decision taken at the beginning of the consideration of the draft Headquarters Agreement (see LOS/PCN/SCN.4/L.11, para. 10), the Special Commission took up the preamble after completing the discussion of the articles of the draft. The preamble was examined paragraph by paragraph.

First paragraph

The Special Commission agreed to the paragraph as worded; it was suggested, however, to merge it with the third preambular paragraph.

Second paragraph

Opinions differed as to the necessity of making reference in the preamble to the legal personality of the Tribunal in accordance with the Protocol/Agreement on Privileges and Immunities.

Several representatives suggested the deletion of the paragraph. They argued that the juridical personality of the Tribunal derived directly from its function as defined in annex VI to the Convention and did not necessarily require any further legal basis in the Protocol/Agreement.

Some representatives however favoured retaining the paragraph. They felt that the Protocol/Agreement should provide for the juridical personality of the Tribunal. They considered this indispensible and in accordance with general treaty practice.

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Third paragraph

The paragraph makes reference to article 1, paragraph 2 of annex VI to the Convention, according to which the seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany. In this context a footnote to this preambular paragraph points to the requirement recorded in paragraph 38 of the Final Act of the Third United Nations Conference on the Law of the Sea (A/CONF.62/121).

It was proposed that the footnote should reflect the wording of document A/CONF.62/L.78, to read as follows:

> "See the requirement in paragraph 38 of the Final Act of the Third United Nations Conference on the Law of the Sea (A/CONF.62/121) and the introductory note to the revised draft Convention (A/CONF.62/L.78) stating that the decisions on the sites of the Authority and the Tribunal were then by the informal plenary subject to the requirement that the States specified should have ratified the Convention by the time of its entry into force and should remain Parties to it thereafter".

That was agreed by the Special Commission.

Upon completion of the consideration of the draft Headquarters Agreement, representatives were invited to raise any other issue of special concern to them in connection with the draft.

One representative suggested that a provision be incorporated that would deal specifically with the access of representatives of mass media to the Tribunal. He felt that such a provision could be worded on the lines of article IV, section 11, paragraph 3 of the headquarters agreement between the United Nations and the United States. The Special Commission agreed to that proposal. It was suggested, however, that in drawing up such a provision account should be taken of the relevant practice of the International Court of Justice.

Another representative made reference to the explanatory note preceding the draft Headquarters Agreement (see LOS/PCN/SCN.4/WP.5 (Part I), p. 2) and referred to paragraph 2 which states, among other things, that the Preparatory Commission and the Meeting of States Parties would not wish to tie the hands of the parties concerned, namely, the host Government and the Tribunal, to an unnecessary degree of detail. For that reason the representative felt that a second reading was unnecessary.

Another representative, however, argued that in view of the many substantive proposals put forward with regard to the draft, a second reading was very much needed.

On that matter the Chairman made reference to the relevant recommendation of the Bureau of Special Commission 4, which had been accepted by the Commission. That recommendation was that a final reading of a redraft of the Headquarters Agreement would take place if, after attending to its other business, the Special

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Commission had time left for that purpose and if there was a need for such action (see LOS/PCN/SCN.4/L.11, subpara. 1 (c)).

In conclusion, the secretariat of Special Commission 4 was requested to prepare a revised draft of the Headquarters Agreement, taking into account all the proposals put forward in the course of the discussion and the views expressed in the Commission.

In the course of the article-by-article examination of the draft Headquarters Agreement, a number of other proposals of a drafting nature were made. They involved, above all, suggestions to bring the text of one language in line with the text of the other languages and proposals designed to make the wording clearer without affecting the substance in any manner. Since the present document is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce every suggested formulation. The secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being so informed.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Revised draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany

(LOS/PCN/SCN.4/WP.5/Rev.1)

1. At the ninth session of the Preparatory Commission, Special Commission 4, during its 142nd to 143rd meetings, began the examination of the revised draft of the Headquarters Agreement (LOS/PCN/SCN.4/WP.5/Rev.1). It concluded the consideration of that document during the 146th to 153rd meetings, at the tenth session of the Preparatory Commission.

2. When the Special Commission was first undertaking the examination of the redraft (LOS/PCN/SCN.4/WP.5/Rev.1), the Secretary reminded the delegations that the issue of cooperation and relationships between the United Nations and the International Tribunal for the Law of the Sea had already been discussed at the fifth and sixth sessions of the Special Commission. In that regard, he referred them to documents LOS/PCN/SCN.4/L.10/Add.1, LOS/PCN/SCN.4/L.11 and LOS/PCN/SCN.4/L.11/Add.1. He stated that the new revised paper attempted to reflect an overview of the issue with a spirit of compromise. He stated that he would be ready to answer their questions with regard to the new document.

3. It was suggested that the document be examined article by article, although in the course of the discussions delegations agreed to try to be swift in the examination of the draft paper.

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Article 1. Use of terms

4. With regard to that article, it was pointed out that only subparagraph (h) was a new provision. It was approved that "the Government of Germany" would be said instead of "the Federal Republic of Germany" because of the recent reunification of the two Germanys.

5. The Commission also took the opportunity to approve all the other subparagraphs ((a)-(p)).

Article 2. Juridical personality of the Tribunal

6. This article was generally approved as a whole.

Article 3. The Headquarters district

7. The Secretary introduced this article, by stating that the previous paragraph 4 had been deleted as requested. The article had only been edited to reflect the deleted paragraph in a concise manner.

8. Although one delegation requested that it be stated in a clear manner that the seat of the Tribunal would be the City of Hamburg, it was agreed not to add anything to the article since the City of Hamburg was mentioned in the Preamble.

9. The Commission generally agreed on the title of the article, its two paragraphs and subparagraphs.

Article 4. Law and authority in the Headquarters district

10. Since there were no fundamental changes to the article, article 4, together with its six subparagraphs, was generally approved by the Commission as a whole.

Article 5. Inviolability of the Headquarters district

11. The Secretary stated that the changes with regard, in particular, to paragraph 1 were the reflection of the discussions as contained in document LOS/PCN/SCN.4/L.11. It had been suggested that the President of the Tribunal should not have the whole responsibility to restrict the entrance of "outsiders" to the Tribunal premises. In the new paragraph, the Acting President could also do so.

12. The paragraph, as redrafted, was generally approved by the Commission.

13. With regard to paragraph 2, some delegations were opposed to the notion of the Registrar carrying out judicial actions. They insisted that the Registrar was an administrative entity and was therefore inadequately accorded too much power.

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14. Some other delegations were of the view that the Registrar and the President were acting in this instance as the representatives of the Tribunal. One delegation pointed out that, traditionally, the Secretary-General, and not the President of the General Assembly, for example, was the one to fully represent the international organization despite his being an administrative instance. He insisted to retain the paragraph as it stood.

15. It was suggested either to delete the reference to the Registrar or to say instead "the President or his designates". Other suggestions were to add "or acting President" or "the President or other persons appointed by him".

16. It was also suggested to examine the practice of the International Court of Justice vis-à-vis the Netherlands. In the end, it was agreed to retain the paragraph pending further consultations on the matter, in paragraph 2 as well as paragraph 3.

17. One delegation, although recognizing that paragraph 5 was in accordance with international law, expressed the wish that it be made clearer that the Tribunal could not grant, in any case, asylum for political reasons. However, he still agreed on the paragraph as it stood.

Article 6. Vicinity of the Headquarters district

18. It was pointed out that the wording "reasonable steps" used in paragraph 1 was too vague.

19. It was suggested to say instead "measures", which was the wording used in the other language versions. It was agreed to bring the English, the original version, into line with the other language versions which, in this case, were more accurate.

Article 7. Protection of the Headquarters district

20. Two issues were raised with regard to this article. One delegation stated that, as in article 6, instead of "whatever action", the word "action" should be replaced by "measure" and thus be harmonized with the other language versions. Another delegation disapproved and suggested, on the contrary, to repeat here the original version in article 6, i.e., "all reasonable steps".

21. The other issue raised was with regard to the consent by "the Tribunal". Some delegations wanted the notion of the Tribunal to be more targeted i.e., the President or Acting President, etc. Another delegation's suggestion was deemed contrary to the definition of the Tribunal found in article 1.

22. In that regard one delegation warned the Commission that it should take into consideration the different cases involved in the different articles. He stated that in paragraph 5 there was a kind of urgency, while in paragraphs 7 and 8 there was the non-urgent threat of dispossession, on the one hand, and of loss of buildings, on the other.

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23. In the end, it was generally agreed to accept the text of paragraph 1 with the wording "consent of the Tribunal" remaining, with the substitution of the word "action" by "measures".

24. With regard to paragraph 3, one delegation suggested to say "... shall provide the policy and the security forces ...". This was generally agreed upon by the Commission.

Article 8. Property

25. The Secretary reminded the delegations that article 8 was a slightly modified version of article 12 moved to this position, as this had been requested and approved by the Commission.

26. He pointed out, however, that there was a substantive change in paragraph 1 with the wording "should be explicitly formulated by the President of the Tribunal". He clarified that this wording could be found in the Headquarters Agreement between the United Nation and the United States of America.

27. In this end, this article, with the modifications stated above, was generally agreed upon as a whole.

Article 9. Public services in the Headquarters district

28. Since the article was only a redraft of the previous article 8 moved to this position and with no substantial change, the Commission agreed on it.

Article 10. Communications facilities

29. The Secretary stated that the article was a redraft of the previous article 9 (LOS/PCN/SCN.4/WP.5/Part I).

30. One delegation noted with satisfaction that the Tribunal would enjoy the same facilities as given to an international organization. In that regard he suggested that "international organizations" be replaced by "intergovernmental organizations". He explained that this terminology would be more accurate since "international organizations" could imply also non-governmental organizations.

31. Other suggestions were made but in the end it was agreed to keep the wording used in paragraph 1, but to revert to article 1 ("Use of terms") and include in the definition of international organization the same definition as in the Vienna Convention, i.e., "intergovernmental organization".

32. Another delegation was of the view that in paragraph 1 the term "international treaties" should be used instead of "agreement", because a treaty covered all kinds of agreements.

33. The Commission agreed on the substitution. Article 10 was therefore generally agreed upon with the above change.

Article 11. Flag and emblem

34. This article, together with its footnote, was generally approved by the Commission.

Article 12. Archives

35. It was suggested that the words "in the host country" be used in order to be consistent with article 8. Article 12 together with this change was generally agreed upon.

Article 13. Social security and pension funds

36. The Secretary reminded delegations that there had been numerous discussions on this article as contained in document LOS/PCN/SCN.4/L.11. The present article was an attempt to accommodate some of the views expressed.

37. To the question as to why it had been necessary to include such an article on social security and pension funds it was answered that Germany, the host country, had requested it. The Secretary also added that there was a pension scheme within the United Nations. For the Tribunal, it had been necessary to include a social security scheme because otherwise the Tribunal officials would have neither the one nor the other. In that regard, delegations were also referred to LOS/PCN/SCN.4/WP.9/Add.1.

38. In the end, the article was generally approved by the Commission.

Article 14. Exemption from taxation, customs duties and import or export restrictions

39. The Secretary stated that this article was former article 15 and that it had been patterned, *inter alia*, after the provisions of the International Atomic Energy Agency (IAEA) Headquarters Agreement.

40. The article was generally approved by the Commission as drafted.

Article 15. Freedom from currency restrictions

41. The Commission generally approved the article as it stood.

Article 16. Privileges, immunities, facilities and prerogatives

42. Since it was just a reproduction of former article 17 of document WP.5/Part II, the Commission agreed on it.

Article 17. Members and officials of the Tribunal

43. The Secretary introduced the article by stating that it was about the categories of officials involved in the enjoyment of privileges and immunities.

44. One delegation suggested that the terminology "in general way" be used as it had been used with regard to the enjoyment of privileges and immunities by the officials of the International Court of Justice. The same delegation was of the view that when referring to unmarried children, the phrase "of minor age" should be included.

45. Another delegation suggested that the order of words be reversed and that "facilities and prerogatives" be used, because "prerogatives" might represent privileges and immunities while "facilities" had a meaning of its own.

46. Another delegation suggested that paragraph 3 should contain the phrase "private domestic staff", in accordance with the other language versions and also because this wording was not often utilized.

47. The same delegation insisted upon seeing included in this article a mechanism to waive the immunities of the officials of the Tribunal. He was supported by other delegations.

48. The Secretary explained that since he had consulted with the representative of the International Court of Justice, it had been clarified that there were no provisions on the waiving of the immunities of the officials of the Court. He suggested that the matter be brought up at the meeting of States Parties.

49. Another delegation suggested that paragraph 1 of article 17 be redrafted to say: "subject to the provisions of this agreement, ... shall be consistent, etc.". This would accommodate the suggestion to insert the words "in a general way".

50. Delegations generally agreed on the above change in the same manner as they had also agreed to reverse the order of the words "privileges and facilities", as described above.

51. With regard to the comment on unmarried children of minor age, it was concluded that the issue should remain open until it was again taken up in the consideration of the protocol on privileges and immunities (LOS/PCN/SCN.4/WP.6 and Rev.1).

52. With regard to the other suggestions as described above, it was generally agreed to attempt to bring all the language versions into concordance.

Article 18. Ad hoc members and experts appointed under article 289 of the Convention

53. The article was generally approved as a whole by the Commission.

Article 19. Agents representing parties, counsel and advocates appearing before the Tribunal

54. One delegation was of the view that paragraph 1 should reflect a broader understanding of the privileges and immunities in order for the concerned authorities and the Tribunal to be well protected against the violation of documents and papers. He insisted that the parallelism of forms should be respected since the issue had already been discussed with regard to document WP.6.

55. He therefore requested the removal of the sentence in paragraph 1 (c) containing the words "relevant to the exercise of their functions".

56. The Commission agreed to the above deletion. It was also understood that at paragraph 7, the words "competent authorities" referred to the host country.

57. It was agreed that the Secretariat would replace, if necessary, the word "of" by "to" in paragraph 7. With regard to the use of the word "prerogative", a clarification was sought by one delegation. It was stated that the wording was taken from the exchange of letters between the ICJ and the Government of the Netherlands, since there was no headquarters agreement between them.

58. In the end, article 19 was generally agreed upon in its entirety, taking into consideration the above.

Article 20. Witnesses, experts and persons performing missions

59. One delegation suggested that article 20 (1) be merged with article 19 (1). Another delegation suggested that the word "any" be changed to "every".

60. Both suggestions were not agreed upon.

61. Another delegation asked why the persons enumerated in article 20, paragraph 1, did not enjoy "prerogatives". It was stated that they were not diplomats, as in article 19, and that they would only enjoy functional immunities.

62. In the end, article 20 was generally approved as it stood.

Article 21. Nationals and residents of the host country

63. The clarification was made for one delegation that what would be exempt from direct taxation would be the salaries and emoluments paid to the staff members who were nationals or residents of the host country. It was argued that that would lend a certain imbalance to tax emoluments in which every State would have participated.

64. Article 21 was generally approved as drafted by the Commission.

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Article 22. Waiver

65. There was some controversy as to this article since some discrepancies were noted at the outset vis-à-vis the relevant article in document LOS/PCN/SCN.4/WP.6 dealing with privileges and immunities. The Secretariat agreed that harmonization of the two texts and the relevant articles in document LOS/PCN/SCN.4/WP.5/Rev.1 would have to be undertaken for a better consideration of the issue of waiver.

66. Despite the above, it was deemed necessary to discuss article 22 so that further considerations by delegations might help the Secretariat in its changes to the document. To that end, it was agreed that the article would be examined paragraph by paragraph.

Paragraph 1

67. Some delegations suggested deleting the words "and the Tribunal", since the Tribunal could not be involved in the waiver of the immunities of an official from a State party. In further consideration of the paragraph it was pointed out that the difficulties encountered by delegations were attributable to the confusion between the officials referred to under article 19 and article 20.

68. It was therefore agreed to use instead the wording from article 16 of the Protocol on privileges and immunities and to draw a distinction between the two categories.

69. Another delegation suggested that the reference to article 20 ("and 20") be deleted altogether. But in the end it was agreed that, taking into consideration article 67 of the rules of procedure of the Tribunal, it would be more accurate to specify "article 20, paragraph 2".

70. It was then concluded that paragraph 1 of article 22 was generally agreed upon by the Commission with the agreed delegation of the words "and the Tribunal" (third line), and with the addition of "20 and paragraph 2".

Paragraph 2

71. One delegation, referring to a paper circulated by another delegation, suggested that "the two-third majority" be used instead of "unanimous decision of its available members". It was also suggested that, with regard to the change in paragraph 1, paragraph 2 should be harmonized with the phasing-in provisions of the Tribunal as contained in LOS/PCN/SCN.4/WP.8.

72. It was argued that since the matter of a waiver was an important one, it should be required to have at least 14 of the 21 Members available (i.e., two thirds), although the quorum required to constitute the Tribunal is only 11 Judges.

73. Taking into consideration the remark that in any case paragraph 2 of article 22 would have to be compared to article 2 (d), one delegation suggested deleting the word "unanimous" and adding the notion of "a two-thirds majority of its membership".

74. In the end it was decided to postpone any decision on the paragraph pending the consideration of written proposals and consultations on other documentation by the Secretariat.

Paragraph 3

75. Delegations agreed that the remarks on paragraph 2 applied also to this paragraph.

Paragraph 4

76. It was suggested that reference be made in this paragraph to article 20, paragraphs 1 and 3. It was also pointed out that the same remarks on paragraphs 2 and 3 applied to this paragraph as well.

Paragraph 5

77. One delegation wanted to know why the Registrar, and not the President, was given the authority to waive the immunities of the staff.

78. It was pointed out that, as in the ICJ, the Registrar was the one who usually performed this function. In that regard, and in reference to document LOS/PCN/SCN.4/WP.6/Rev.1, the Deputy Registrar was to be considered in the same manner as the Registrar.

79. At the end of the consideration of article 22, one delegation made a general statement on the whole article. He requested that the balance between the waiving of immunities be respected. He suggested in that regard that there be an additional paragraph or article, which would take care of article 8 of the statute. This article would state that "no member of the Tribunal may participate in the decision of any case in which he had previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or Tribunal, or in any other capacity".

80. One delegation opposed this addition.

81. The Secretary, in reference to the question raised with regard to the majority waiving the immunities of the officials (art. 32, para. 2), stated that in the case of the European Court, the Court had the right to waive the immunities of its officials if the Community interest was not at risk. But he stated that this would occur rather in the case of an administrative function than a judicial one.

82. In that case, the question was raised as to what would be the majority to be involved for a functional immunity? A solution to this problem was drawn from document LOS/PCN/SCN.4/1991/CRP.41 and could be found in the text of article 22, paragraph 2. But the question remained of the unanimity to be required in the case of the phasing-in of the Tribunal having less than 21 Members.

83. With regard to the question raised by the phrase "... would impede the cause of justice and can be waived without prejudice to the administration of justice ..." (art. 22, para. 5), the Secretary stated that a consensus had

already been reached 1/: to refer to article 4, section 14, second sentence, of the Convention on the Privileges and Immunities of the United Nations. The new sentence took into consideration both the law of Germany and the administration of justice by the Tribunal.

84. In conclusion, he stated that immunities could only be waived if they impeded the course of justice and if they could be waived without prejudice to the purpose for which they had been accorded.

85. Some delegations agreed to the explanations given by the Secretariat and were of the view that a redrafting, taking into account the explanation given, would resolve the ambiguity in paragraph 5.

86. With regard to the question of the phasing-in period, suggestions to establish two criteria for the different periods were rejected. An ad hoc working group suggested deleting in paragraphs 2 to 4 the phrase "which includes a two-thirds majority of its membership".

87. The suggestion was approved.

88. The Commission generally approved article 22 with the above changes.

Article 23. Laissez-Passer, identity cards and notifications

89. The same issue was again raised as to the independence of the Tribunal *vis-à-vis* its ability to issue its own *laissez-passer*, or if it would be preferable to use the United Nations *laissez-passer*. Some delegations considered that the Tribunal should benefit from the United Nations in the same manner as did other organs under the Convention.

90. One delegation expressed reservations with regard to the above suggestion and proposed the inclusion of a footnote to article 23 referring to article 18 of document LOS/PCN/SCN.4/WP.6/Rev.1 which deals with the use of the United Nations *laissez-passer*.

91. In the end, paragraph 1 of article 23 was agreed upon with the addition of a footnote. The Commission, however, also took note of the reservations of some delegations.

92. With regard to paragraph 2, one delegation raised the issue of "stateless persons", and particularly witnesses without a nationality.

93. It was agreed that a sentence in this paragraph containing a reference to the Convention on stateless persons should resolve that issue.

94. Article 23 was generally agreed upon by the Commission taking into account the above considerations.

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Article 24. Entry, transit and sojourn in the host country

95. One delegation requested that the Spanish version of the article be brought in line with the English version, and in particular with regard to the translation of "host country". He suggested that the words "país anfitrión" be used. This suggestion was supported by other delegations.

96. Another delegation suggested that paragraph 2 should refer to articles 17 to 20 or that paragraph should be merged with paragraph 1.

97. Article 24 was generally approved in its entirety along with the agreed harmonization and stylistic changes.

Article 25. Security

98. It was suggested that the words "host country" be used instead of "Federal Republic of Germany". This suggestion was approved.

99. Article 25 was generally accepted by the Commission, with the above change.

Article 26. Responsibility, liability and insurance

100. Article 26 was generally approved with the change accepted under paragraph 25.

101. It was further approved that the expression "host country" would be used throughout the text whenever reference would be made to Germany.

Article 27. Cooperation with the competent authorities

102. One delegation considered that paragraph 1 of the article was quite vague.

103. The Secretary responded that the purpose of the text was to provide an opportunity for cooperation between the Tribunal and the host country. He insisted that it was a provision common in all headquarters agreements.

104. Another delegation wanted to know why reference was only made to experts under article 289 of the Convention, and not to other categories of experts.

105. It was stated that the other categories of experts were referred to elsewhere, such as in articles 18, 20 and 22. The terminology was inspired from the Convention and article 27 dealt exclusively with the experts that were treated almost as ad hoc Judges or assessors.

106. Another delegation was of the view that article 19 of the Protocol (LOS/PCN/SCN.4/WP.6) was better drafted and should provide the inspiration for this article. But it was explained that the Protocol referred to a limited period of time while document LOS/PCN/SCN.4/WP.5/Rev.1 was drafted on a more permanent basis.

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107. In the end, it was generally agreed that article 27 should be adopted in its entirety.

Article 28. Supplementary agreements

108. One suggestion was to merge articles 28 and 31 because the one dealt with drafting additional agreements while the other dealt with amending an existing agreement; the two articles were thus complementary.

109. One delegation opposed the above suggestion because article 28 dealt with an agreement that would give effect to various provisions while article 31 dealt with amendments. He was also of the view that the word "adjusting" in article 28 should be replaced by a better expression.

110. Another delegation supported him and was of the view that the problems in this article lay once again in the use of the word "adjusting". He suggested therefore the following words be used instead: "conclude supplementary agreements to this agreement so far as ...".

111. Other delegations insisted that article 28 should remain separate from article 31 because supplementary agreements were fundamentally different from amendments. It was suggested to simply delete the word "adjusting".

112. In this regard, mention was made of other precedents, such as the headquarters agreement between Kenya and the United Nations Environment Programme (UNEP).

113. In the face of the majority in favour of separate articles, it was agreed to retain article 28 as drafted and to delete the words "adjusting the provisions of" and replace them by "to".

114. Article 28 was generally agreed upon with the above change.

Article 29. Application of the relevant agreements on the privileges and immunities of the Tribunal

115. One delegation was concerned by what would happen if provisions in the Headquarters agreement conflicted with provisions of the Protocol on privileges and immunities when applying to the same subject, since neither provisions should restrict the other. He therefore suggested that the words "deal with the same subject" be deleted and replaced by "apply to a specific case". He was supported by other delegations who argued that the Protocol took precedence over the Headquarters agreement.

116. Another delegation argued that the second part of the article was unnecessary and that therefore the article should end after the word "Protocol".

117. One delegation was of the view that since both texts were complementary, he suggested the use of the word "complementary" instead of "supplementary".

118. It was then argued that the Headquarters agreement should prevail in case of conflict.

119. In the end, the Commission had to decide between two different suggested alternatives. The first alternative would give precedence to the Headquarters agreement over the Protocol, and read as follows:

> "The Provisions of this Agreement shall be considered supplementary to the provisions of the Protocol. When a provision of this Agreement and a provision of the Protocol are applicable to the same specific case, both provisions shall be considered complementary wherever possible; both of them shall be applied and neither shall restrict the force of the other. Nevertheless, in the event of a conflict, the provision of the present Agreement shall prevail."

120. The second alternative, on the other hand, would read as follows:

> "The provisions of this Agreement shall be considered supplementary to the provisions of the Protocol. When a provision of this Agreement and a provision of the Protocol deal with the same subject, both provisions shall be considered complementary wherever possible; where this is not possible, the provisions of the Protocol shall prevail."

121. To help the Commission decide, reference was made by the Secretary to various other documents: section 29 of the Agreement between the United Nations and the United States of America; section 41 of the Agreement between UNEP and Kenya; section 41 of the Agreement between the United Nations Industrial Development Organization (UNIDO) and Austria; and section 26 of the Agreement between the United Nations University (UNU) and Japan. These reference documents tended to refute the objection made by one delegation that the second proposal would be attempting to grant the host country sovereignty.

122. One delegation argued that in a case of conflict no text should be superior to the other. It should be left to the host country and the Tribunal to deal with the matter without prejudice to a member State.

123. Another delegation insisted that it should be up to the Commission to see to it that no conflict arose between the two texts. In that regard it was suggested to postpone any decision on the article until the text of the Protocol had been examined in its entirety.

124. Finally, after the intervention of a representative of the Group of 77, advocating that the Headquarters agreement should prevail over the Protocol, it was generally agreed that the article would be drafted as in article 55 of the Agreement between the Authority and Jamaica. 2/ However it was requested that a restrictive approach be adopted when granting privileges and immunities. It should be made certain that a general agreement did not derogate inordinately from detailed provisions. An effort should be made to include similarities in both texts.

Article 30. Settlement of disputes

125. One delegation asked what the practice was between the ICJ and the Government of the Netherlands.

126. Another question was raised concerning the fact that there was no mention of applicable law in the article; what law would then be applied to resolve disputes, the German or international law?

127. One delegation was of the view that, with regard to the latter question, German law should apply for paragraph 1 (a) and a compromise between German law and international law to paragraph 1 (b).

128. In the end, the Secretary pointed out that the text in article 30 only called for arbitration in case of a settlement of disputes between the Tribunal and Germany. Paragraph 2 of the article sought to overcome the time element.

129. Taking into account that point of view, article 30 was generally approved by the Commission.

Article 31. Amendments

130. The Secretary pointed out that there already was a suggestion to move this text and article 28 closer to each other. He noted however that the majority of delegations seemed to be in favour of keeping the articles separate.

131. One delegation insisted that this article contain the full titles of the institutions concerned and not abbreviations, such as "the Tribunal" or "the Government". It was stated that the abbreviated forms were used because of the lengthy nomenclature of both parties. Precedents showed that while there was no headquarters agreement between the ICJ and the Government of the Netherlands, the relevant exchange of letters sometimes referred to the International Court of Justice as "the Court".

132. Other suggestions made by delegations included deletion of the word "only"; replacing the word "Agreement" by "by mutual consent"; and placing the words "host country" before the words "Tribunal". All of them received support, but the latter suggestion was however withdrawn after attention was called to the title of document LOS/PCN/SCN.4/WP.5/Rev.1.

133. Some delegations pointed out that despite the lengthy names of both parties, they should be used in article 31: "the International Tribunal for the Law of the Sea and the Federal Republic of Germany or the host Government".

134. With regard to the suggestion to delete the word "only", the Secretary pointed out that this would leave the option open for anyone to amend the Agreement. Taking this remark into consideration, the suggestion was withdrawn.

135. However, other delegations were of the view that the other suggestion continued to open the possibility mentioned above. The suggestion was to retain the word "only" but also to be more restrictive and add that the amendment should be made "by agreement" or even "written agreement".

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136. Finally, it was agreed to say "the provisions of this Agreement may only be amended by agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany".

137. The new article 31 was then generally approved by the Commission.

Article 32. Final provisions

138. One delegation was of the view that the content of the article did not constitute final provisions.

139. The delegate from Germany was of the view that the constitutional law of his country should be taken into account. He suggested a new text that would read as follows:

> "This Agreement shall enter into force following its signature on behalf of the International Tribunal for the Law of the Sea and on behalf of the Federal Republic of Germany, thirty days after the Federal Republic of Germany has notified the President of the Tribunal that the internal constitutional requirements for the entry into force of this Agreement had been fulfilled."

140. It was therefore generally agreed that the title should be changed to read: "Entry into force".

141. A remark was made with regard to provisions of the Vienna Convention on the Law of Treaties allowing for the provisional application of a treaty.

142. It was pointed out that although the Vienna Convention provided for multiple possibilities, it did not do so when there was a need to have recourse to the Parliament. It would not apply, therefore, in the case of the Headquarters agreement under consideration.

143. Another delegation, referring to the rules of procedure of the International Tribunal for the Law of the Sea, wondered if it would be correct to commit the Tribunal in this article.

144. Another delegation argued that a State party to an international agreement should make sure that its domestic law is taken into account beforehand.

145. In the end the Commission generally agreed upon the text suggested above (see para. 139) and as contained in document LOS/PCN/SCN.4/1992/CRP.45. This text had been patterned after the Agreement between the European Molecular Biological Organization and Germany.

146. Another issue was raised concerning the paragraph under article 32 dealing with the final provisions.

147. Some delegations argued that since the Headquarters Agreement was a bilateral agreement, it should also be drafted in French. This remark was raised following a suggestion to state that if a conflict arose between the English and the German versions, the English version would prevail.

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148. Another delegation was of the view that this question should be postponed until the issue of languages was taken up.

149. It was clarified that the Vienna Convention on the Law of Treaties, 3/ in its article 33, paragraph 1, stated that "when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail". It was therefore pointed out that the question of the authenticity of a language was different from the question of which language version would prevail over the other.

150. In the absence of any conclusive decision with regard to the matter, it was decided to adhere to the provisions of the Vienna Convention and include the reference to the French version but otherwise leave the text as it stood. This meant that no stipulation was made as to which language text would prevail in case of a divergence.

151. At the end, it was stated that the Commission had thus concluded its consideration of document LOS/PCN/SCN.4/WP.5/Rev.1.

152. Since it is not possible in the present summary to reflect each and every suggestion made in the course of the debate, the Chairman would appreciate being apprised of matters of consequence not reflected in the summary or in the final text of LOS/PCN/SCN.4/WP.5/Rev.2, as also contained in document LOS/PCN/SCN.4/WP.15/Add.2.

Notes

1/ Ref. LOS/PCN/SCN.4/L.11/Add.1, para. 5.

2/ Ref. LOS/PCN/WP.47/Rev.1.

3/ United Nations, Treaty Series, vol. 1155, p. 331.

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Special Commission 4
Sixth session
Kingston, Jamaica
14 March-8 April 1988

Report of the Chairman on the visit by the Bureau of Special Commission 4 and officials of the United Nations Secretariat to the Federal Republic of Germany (24-28 August 1987)

On the invitation extended by the Federal Republic of Germany and the Senate of the Free and Hanseatic City of Hamburg, the Chairman, members of the Bureau of Special Commission 4, the Special Representative of the Secretary-General, and the Secretary of the Special Commission visited Hamburg and Bonn from 24 to 28 August 1987. One member of the Bureau of our Special Commission, Dr. Antonio-Jose Uribe-Protocarrero of Colombia, for personal reasons was prevented from making this visit together with us. He has since visited Hamburg and Bonn in February this year.

The visit was intended to enable the Bureau to consider the accommodation and staffing requirements of the Tribunal and to examine the suitability of the buildings proposed for the temporary accommodation.

During the visit to the Federal Republic of Germany, the members of the visiting delegation were shown the proposed site selected by the Federal Government in the City of Hamburg at Elbchaussee near Blankenese. They were also shown preliminary plans and sketches of the proposed facilities that will be provided by the Federal Government in the City of Hamburg. The proposed site, which is 28,000 square metres in area, is situated along the river Elbe and overlooks the harbour. As a result of the visit and the information provided, the Bureau found that the location was well suited for the purpose and the general surroundings were an appropriate setting for the conduct of the Tribunal's work.

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As regards the necessary facilities, the authorities of the Federal Republic had studied those of the International Court of Justice and other international courts and institutions so as to arrive at assessments concerning the requirements of the Tribunal. A delegation from the Federal Government had also visited New York to consult with the technical services of the United Nations and the secretariat of Special Commission 4, between 13 and 16 June 1987, and reviewed the prospective requirements for the Tribunal, taking into account the nature and the functions of the Tribunal. On this basis, the representatives of the Federal Republic provided the visiting team with an outline of the facilities that appear to be necessary and which they are prepared to provide free of cost. It was indicated that the facilities would be constructed in such a manner that they will lend themselves to further expansion should that become necessary in the future.

While considerable progress has been made in planning the building and facilities, one important factor which affects the planning at this stage is the decision which will have to be taken by the Meeting of States Parties, based on the recommendation of the Preparatory Commission, regarding the number of official and/or working languages of the Tribunal for which provision would have to be made. A decision on this matter would considerably affect the meeting facilities, the size of the staff, including interpretation, translation and printing services, library, documentation, etc., as well as the size of facilities required for language booths in the hearing and deliberation chambers, and other equipment necessary to accommodate the various languages. The present planning is based on the practice of the International Court of Justice, and the final planning will be facilitated once the determination is made as to the question of languages.

The Bureau was assured that planning will continue in order that the facilities are made available when the Tribunal is ready to function shortly after the entry into force of the Convention.

The Bureau was also assured that should the facilities not be ready on time, after the Convention comes into force, adequate and suitable temporary facilities will be provided in existing buildings centrally located in the City of Hamburg pending the completion of the permanent facilities. In this regard, the Bureau was taken to visit two existing buildings which may be used as temporary facilities should that become necessary. One such building was the Court of Appeals, which had hearing rooms, chambers for the judges, a library and other facilities. The other was a commercial building with an open floor plan and flexible partitioning arrangements which could readily be modified, in accordance with the needs, into courtrooms, chambers, offices, library, etc.

During the course of the visit, the Group had an opportunity to meet with the Mayor of Hamburg and other officials of the Federal Government located in Hamburg or accompanying the visiting delegation. The visiting delegation also had the opportunity to meet with the Federal officials in Bonn, both

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officially and informally, and it expressed its appreciation for the planning and preparation already made. It also reminded the concerned officials of the Federal Government and of the City of Hamburg that the establishment of the Tribunal in Hamburg was subject to the requirements referred to in paragraph 38 of the Final Act of the Third United Nations Conference on the Law of the Sea, namely, that the Federal Republic of Germany should be a party to the Convention by the time of its entry into force.

As regards the position of the Federal Republic of Germany with respect to the Convention, it was apparent from the discussions and statements made by its officials that the Federal Government continues to attach importance to the Convention although it has not as yet acceded to it. We were told that while the Federal Republic of Germany is encouraged by the recent achievements of the Preparatory Commission towards developing an acceptable sea-bed mining régime, it has, however, not taken any decision regarding its accession at this stage.

The Chairman, the members of the Bureau, and the secretariat officials expressed their appreciation for the opportunity provided to visit the proposed site and facilities for the Tribunal and possible temporary facilities, and to obtain an insight into the progress of its planning. They also expressed their gratitude to the Federal authorities and the authorities of the City of Hamburg for the hospitality extended to them.

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PREPARATORY COMMISSION FOR THE
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Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea

1. During the 6th Session (14 March-8 April 1988, Kingston, Jamaica) the Special Commission commenced the examination of a draft legal instrument to be applicable within or outside the host country embodying the privileges, immunities and facilities to be accorded to the Tribunal, its officials and its other functionaries contained in document LOS/PCN/SCN.4/WP.6 prepared by the Secretariat. In the examination of the draft, the Special Commission employed the same method of work as it did for the draft Headquarters Agreement, in that:

(a) It would concentrate on the substantive issues in the articles while avoiding discussions of a drafting nature, notwithstanding the fact that the draft consisted of fully formulated articles.

(b) The draft should be examined article by article and paragraph by paragraph where articles are divided into paragraphs. The preamble was to be taken up at the end of the discussion of the articles. Prior to the examination of each article the Secretary was to explain the content of and the rationale behind the different draft provisions. He was also to identify the relevant precedents which were used when drafting the text.

(c) The Secretariat was to be requested, when revising the draft, to take into consideration the proposals that were expected to be put forward in the course of the discussion within the Special Commission. A review of that redraft would take place, if after attending to its other business the Special Commission had time left for that purpose and, if there was a need for such action, since the Protocol would have to be presented for approval to the meeting of the States parties in accordance with annex VI, article 4 of the Convention.

2. In introducing the draft, attention was drawn by the Secretary to the various precedents on which it was based, in particular the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 and the practice of the International Court of Justice.

3. Delegations were given the opportunity to make general comments on the document before an article-by-article discussion was commenced. In this connection attention was given to the question of the proper title of this legal instrument. Some delegations preferred the instrument to be in the form of a convention since it would have an autonomous position beside the Convention on the Law of the Sea. They argued that it was quite possible for States not parties to the Law of the Sea Convention to become parties to that legal instrument. It was in the interests of the Tribunal that that instrument should be applicable as universally as possible in order to ensure that the Tribunal would be provided with the privileges and immunities outside its host country as well pursuant to annex VI, article 1 (3) of the Convention on the Law of the Sea. Another argument was that the precedents used were also conventions rather than protocols.

4. Other delegations were of the view that the future legal instrument should be a protocol since it was designed to create the practical prerequisites for the functioning of the International Tribunal for the Law of the Sea provided for in the Convention on the Law of the Sea and, thus, served to implement the Convention. This function of the instrument would be clear from the usage of the term "protocol".

5. After some discussion, there was general agreement in the Special Commission that the title of the legal instrument would have no influence on its legal effect. It was agreed to call the new instrument a "protocol".

6. The proposal was accepted to include an article in the Protocol on the use of terms. This would make the document more comprehensible.

7. Several delegations were of the view that the Protocol should be patterned on the draft Headquarters Agreement in order to preclude any conflicting provisions in the two legal instruments.

8. The Special Commission then began its article-by-article consideration of the draft.

Article 1 - Juridical personality

9. In the introduction to that article it was pointed out that this provision had a number of precedents, including article 1 of the Convention on the Privileges and Immunities of the United Nations.

10. A number of delegations felt that the title of the article should be brought in line with article 2 of the draft Headquarters Agreement (Legal personality of the Tribunal) since the two legal instruments were closely interrelated. Accordingly, it was suggested to use either the term "legal personality" or "juridical personality" in both instruments. The Special Commission decided not to

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change the heading of article 1 of the Protocol but to amend the title of article 2 of the draft Headquarters Agreement thus: "Juridical personality of the Tribunal". To buttress this argument reference was made to article 2 of the draft Headquarters Agreement between the United Nations and Jamaica which reads as follows: "Juridical personality and capacity". There was agreement that this change to the draft Headquarters Agreement, as a result of the discussion on the Protocol, was to be an exception and should not give rise to any precedents.

11. Another proposal was to expressly mention, in subparagraph 1 (b), the acquisition of property by leasing. Those who opposed this proposal argued that the term "acquire" also covered the notion of leasing. (cf. LOS/PCN/SCN.4/L.11, para. 21).

12. Another suggestion was to introduce a new subparagraph in article 1 which would broadly cover the exercise of such acts as may be necessary for the exercise of the Tribunal's functions and the fulfilment of its purposes. This general formulation with regard to the capacity of the Tribunal was designed to take care of all situations that are not covered by subparagraphs (a), (b) and (c).

13. In the end, however, the prevailing view was not to change paragraph 1 since it was comprehensive in substance and fully in line with the available precedents.

14. The discussion on paragraph 2, under which the Registrar will act on behalf of the Tribunal in matters referred to in paragraphs (a), (b) and (c), focused on the question of whether this provision should be in the Protocol or rather in the internal administrative rules of the Tribunal. It was agreed that the proper place for this provision was the administrative rules of the Tribunal and therefore paragraph 2 of article 1 should be deleted.

Article 2 - Property, funds and assets

15. This article provides for the immunity of the Tribunal and its property and assets from legal process and for the inviolability of its premises.

16. In the introduction of the article the Secretary of the Special Commission pointed out that the language of this article follows article II, sections 2 and 3 of the Convention on the Privileges and Immunities of the United Nations.

17. During the discussion, several delegations suggested that the problems relating to the immunity of the Tribunal, its property and assets should be dealt with in an article separate from matters relating to the inviolability of the Tribunal's premises. To buttress their argument, they referred to the Protocol on the Privileges and Immunities of the International Marine Satellite Organization (INMARSAT) of 1 December 1981 and to the Protocol on the Privileges and Immunities of the European Telecommunication Satellite Organization (EUTELSAT) of 13 February 1988. Other delegations, while preferring the Convention on the Privileges and Immunities of the United Nations as precedent, reserved the right to come back to this question after examining the INMARSAT and EUTELSAT protocols and their appropriateness to the provisions on the privileges and immunities of the Tribunal on the Law of the Sea.

18. Reference was made, in the discussion, to the first sentence of paragraph 1 according to which the Tribunal, its property and assets wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as, in any particular case, the Tribunal has expressly waived its immunity. In this connection the opinion was expressed that such immunity could be waived only by virtue of a unanimous decision of the Tribunal.

19. One delegation referred to article 1, paragraph 3 of annex VI of the Convention according to which the Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable. That delegation felt that in such a case provision should be made for the Tribunal and its temporary host country to make the relevant arrangements at short notice. Accordingly, a new article 2 bis was suggested, which was circulated as document LOS/PCN/SCN.4/1988/CRP.24.

20. A number of delegations reserved the right to come back to that suggestion at a later stage of the examination of the draft.

21. One delegation wondered if "judicial" in the penultimate line of paragraph 2 might not be deleted since immunity from judicial action under paragraph 2 was already covered by the formulation "immunity from every form of legal process" in paragraph 1.

22. Another suggestion was to delete the reference to funds in the heading of this article since the body of the text does not deal with it. Matters relating to funds are covered by article 4 of the Protocol. Opposing this suggestion others felt that the funds of the Tribunal should be included in article 2 in order to ensure their immunity from every form of legal process. They argued, therefore, that the title of article 2 should not be changed.

23. A further suggestion was made which, while favouring the deletion of the reference to funds in the title, saw a need to expressly state in article 4 that the funds of the Tribunal enjoy immunity from every form of legal process under article 2.

24. In this connection several delegations felt that it was necessary to include a clear-cut provision on the status of the bonds or other financial security to be posted with the Tribunal in the case of proceedings before it on the question of the prompt release of vessels and crews.

Article 3 - Archives

25. This provision on the inviolability of the archives of the Tribunal was modelled on article II, section 4 of the Privileges and Immunities of the United Nations.

26. One delegation was in favour of adding a provision along the lines of article 13, second sentence of the draft Headquarters Agreement to the effect that the location of the archives of the Tribunal shall be made known to the Government if it is at a place other than the headquarters district. Other delegations, however, were of the view that such a provision was superfluous in the Protocol. They argued that the archives under article 3 of the Protocol were records referred

to in article 1, paragraph 2 of annex VI of the Convention, whose location anyway must be agreed upon with the temporary host country of the Tribunal under article 1, paragraph 3 of annex VI of the Convention. Eventually, it was agreed to leave draft article 3 unchanged.

Article 4 - Funds and currency restrictions

27. In introducing the article the Secretary of the Special Commission pointed out that it was mostly based on article II, section 5 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 but regarding paragraph 1 (c) of the present article account had also been taken of the draft Rules of the Tribunal as contained in document LOS/PCN/SCN.4/WP.2/Part I.

28. Some delegations, referring to the title of the article, suggested it should be harmonized with the content of the article and therefore, the heading should read: Freedom from funds and currency restrictions.

Paragraph 1

29. The discussion of this paragraph focused on its relationship with article 15 of the revised draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany as contained in document LOS/PCN/SCN.4/WP.5/Rev.1.

30. It was suggested that paragraph 1 of article 4 should be worded along the lines of article 15 of the revised draft Headquarters Agreement since the general formulation used there was more appropriate for the Tribunal than the one contained in article 4, paragraph 1.

31. The prevailing view, however, was to leave the present paragraph as drafted on the grounds that it was a precise and exemplary reflection of the rights and competences of the Tribunal.

32. It was suggested, however, to reword the chapeau of this paragraph to reflect the understanding that the Tribunal in carrying out its activities will not be restricted by financial controls, regulations or financial moratoria of any kind.

33. With reference to subparagraphs (a) and (b), which mention funds, gold or currency of any kind, one delegation preferred a more concise and more modern formulation, citing as precedent article 6 of the General Protocol on the Privileges and Immunities of the Council of Europe, where there is no mention of gold.

34. Concerning subparagraph (c) a clarification was requested on the formulation that the Tribunal may otherwise deal with bonds or other financial securities since the subparagraph already contained a detailed listing of powers of the Tribunal. In response the Secretary of the Special Commission explained that this wording was chosen to facilitate and protect all imaginable financial operations of the Tribunal regarding the prompt release of vessels procedure.

Paragraph 2

35. A redraft was suggested that the Tribunal pay due regard to any representation made by the government of any State party in the exercise of its rights under paragraph 1. The suggestion was to make the paragraph clearer and in the view of several delegations the formulation reflects the necessary balance between the interests of the Tribunal and those of the States parties.

36. With reference to the suggested redraft of paragraph 2 one delegation felt that in line with the wording of article 6 of the draft Convention/Protocol on the Privileges and Immunities of the Tribunal the reference to the government of should be deleted. This suggestion was opposed on the ground that the subject-matters covered by these articles were too diverse to allow such uniformity.

37. Another view taken in the Special Commission was that the paragraph should remain as drafted by the Secretariat.

Article 5 - Exemption from taxes and customs duties

38. In introducing that article the Secretary of the Special Commission drew attention to the precedent that had been followed here, i.e. article II, section 7 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

39. According to that article the assets, the income and other property of the Tribunal are exempt from taxes and customs duties.

40. One delegation was of the view that the bonds to be posted with the Tribunal in connection with proceedings on the prompt release of vessels and crews should also be exempt from taxes and duties. To this end it could therefore be clearly spelled out in article 2 that those bonds were to be subsumed under the property, funds and assets of the Tribunal.

41. With reference to recent international practice with regard to matters of exemption from taxes and customs duties, e.g. the protocols on the principles and immunities of EUTELSAT and INMARSAT, the suggestion was made to reword subparagraph (a) to include the exemption from all direct taxes, but that such exemption shall not, however, relate to taxes paid for services rendered. Another delegation favoured rewording subparagraphs (a), (b) and (c), on the lines of the provisions of the protocols on the principles and immunities of EUTELSAT and INMARSAT.

42. Another suggestion was to divide the article into two paragraphs, paragraph 1 being the present subparagraph (a) which relates to taxes, and subparagraphs (b) and (c), dealing with the exemption from customs duties of goods imported or exported, forming paragraph 2.

Article 6 - Reimbursement of duty or tax

43. The Secretary in introducing the article pointed out that that provision had been taken almost verbally from article II, section 8 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

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44. One delegation felt that the article should be couched in more general terms and adapted to more recent precedents. Attention was drawn in this connection to the relevant protocols on the privileges and immunities of INTELSAT and EURELSAT.

45. One delegation drew attention to the use of the word "shall" in the present draft article which would imply a more stringent obligation of the Tribunal not to claim exemption from duties and taxes as opposed to the Convention on the Privileges and Immunities of the United Nations, where the word "will" had been used. He argued that article 6 should follow the above-mentioned precedent as precisely as possible.

46. Another suggestion made was to refer to property and services in the fourth line. This was opposed on the ground that it would give rise to ambiguity as regards the relationship between this article and subparagraph (a) of article 5, which already covered the problem of taxation for services rendered.

47. One delegation raised the question as to the interpretation of the reference to important purchase in the fourth line. The term, it was argued, plays a key role in this provision since States parties shall, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax to the Tribunal when making important purchases for its official use. Several delegations were of the view that it was up to the State party where the Tribunal was making purchases to decide what was an important purchase. Other delegations wanted to leave that decision with the Tribunal. To clear this matter up it was suggested to redraft article 6 as contained in document LOS/PCN/SCN.4/1988/CRP.26. That redraft provides that in the important purchase of goods and services necessary for the official activities of the Tribunal, when the price of such goods or services includes taxes or duties, States parties shall, if possible, grant exemption from such taxes or duties or provide for their reimbursment if requested by the Tribunal.

48. However, in the course of the discussion of this proposal a number of delegations opposed the suggested redraft. They had a preference for article 6 as originally drafted by the Secretariat. They argued that it should be left to the discretion of the host country to determine, when an important purchase had been made, which was eligible for the remission or return of the amount of duty or tax paid. Several delegations reserved the right to comment on the proposal later on in the discussion when that proposal was available in writing.

Article 7 - Facilities in respect of communications

49. The present draft article is based on article III, sections 9 and 10 of the Convention on the Privileges and Immunities of the United Nations.

50. One delegation felt that the article as drafted was not in keeping with the present time since it ignored the changes in international practice concerning the granting of privileges and immunities to international organizations that had taken place since the adoption of the above-mentioned Convention. In the view of that delegation the Tribunal, in respect of its official communications, was to enjoy treatment, in the territory of each State party, not less favourable than the ones generally accorded to international organizations.

51. Accordingly, a redraft of article 7 was submitted. It is contained in document LOS/PCN/SCN.4/1988/CRP.27. One delegation came out in support of that redraft but other delegations had reservations about it. They pointed out that international organizations, depending on their nature and their purpose, were granted widely divergent privileges, immunities and facilities and that the suggested redraft was, therefore, imprecise and left room for different interpretations by States parties. The provisions applicable to the International Court of Justice should serve as the criterion for what immunities, privileges and facilities were to be granted to the Tribunal. It was not justified to compare the International Tribunal for the Law of the Sea and its functions with international organizations like EUTELSAT or INTELSAT, which were commercial in character.

52. Another delegation pointed out that the Convention on the Privileges and Immunities of the United Nations had stood its test in practice and that there was no reason why the draft Protocol should divert from that precedent on this point. Other delegations reserved the right to comment on the suggested redraft when it would be available in writing.

53. Therefore, the discussion of the redraft could not be completed. The Special Commission agreed to continue the discussion at an appropriate time.

54. Further comments were made on the various paragraphs of draft article 7.

55. It was suggested, with reference to official communications and official correspondence in article 7, to make no distinction between the official communications and correspondence of the Tribunal and its other communications and correspondence since differences of opinion could arise between the Tribunal and a State party as to what should constitute official communications and what should not.

56. Other delegations pointed to the precedent of the Convention on the Privileges and Immunities of the United Nations and argued that there was no reason to depart from that formulation which is well established in practice.

57. One delegation drew attention to the fact that the corresponding article 10, paragraph 1 of the Headquarters Agreement was formulated in far greater detail.

58. Another opinion expressed was that paragraph 1 was well drafted and should not, therefore, be changed.

59. Several delegations supported a suggestion according to which the provisions of this article must not preclude the adoption of appropriate security precautions by a given State party to the Protocol. It was suggested in this connection to include the last sentence of section 12 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947.

Article 8 - Members of the Tribunal

60. The granting of privileges, immunities and facilities to the members of the Tribunal is based on article 10 of annex VI of the Convention under which the Members of the Tribunal, when engaged on the business of the Tribunal, shall enjoy

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diplomatic privileges and immunities. In drafting this article, the Secretariat was guided by United Nations resolution 90 (I) whose annex provides for the privileges, immunities, facilities and prerogatives of members and staff of the ICJ. The Secretariat was also able to take guidance from the Special Commission's agreement in principle that the provisions on the privileges and immunities of the members of the Tribunal should follow the relevant provisions of the agreement concluded between the ICJ and the Government of the Netherlands on 26 June 1946 (cf. document LOS/PCN/SCN.4/L.9, para. 5 ff.)

61. The Special Commission began the discussion with an exchange of opinions on the concept underlying this draft article. Several delegations were of the opinion that it was not necessary to grant to members of the Tribunal world-wide and unrestricted diplomatic privileges and immunities. They felt that they were to be given only such privileges and immunities as are required for the independent exercise of their functions.

62. It was moreover proposed that a paragraph should be added to the article to deal with the waiver of the privileges and immunities of the members of the Tribunal.

63. Other delegations opposed these suggestions. They emphasized that in accordance with article 10, annex VI of the Convention members of the Tribunal shall enjoy diplomatic privileges and immunities. Therefore, the members of the Tribunal were to be accorded diplomatic and not only functional privileges and immunities, and that where the granting of privileges and immunities was concerned it should be ensured that the Tribunal is placed on the same footing as the ICJ. It was argued that the Tribunal should in no way be inferior in status to the ICJ and that the members of the Tribunal would not be put at a disadvantage to the members of the ICJ. Attention was drawn in this connection to article 287 of the Convention on the Law of the Sea in which in the listing of the means for the settlement of disputes concerning the interpretation or application of the Convention the Tribunal is first mentioned and subsequently the ICJ.

64. The suggestion to include a provision on the waiver of the privileges and immunities with regard to the members of the Tribunal was opposed by a number of delegations who argued that the Law of the Sea Convention did not provide for such a possibility and that there were no provisions concerning the waiver of the immunity of the members of the ICJ either, which had not in any way impeded the decades of successful work of that court.

Paragraph 1

65. Concerning the reference to the Vienna Convention on Diplomatic Relations one delegation favoured deleting it and replacing it with a reference to international law in general where the granting of privileges and immunities is concerned. Moreover, that delegation felt that the members of the Tribunal and the heads of diplomatic missions should not, in respect of the granting of privileges and immunities, be placed on the same footing since article 10, annex VI of the Convention did not provide for such parity. Accordingly, a suggested redraft was proposed for paragraph 1 on those lines.

66. Other delegations opposed the suggested redraft. They were in favour of retaining the reference to the Vienna Convention on Diplomatic Relations and the parity between the members of the Tribunal and the heads of diplomatic missions with regard to the granting of privileges and immunities.

67. One delegation suggested the reference to the territory of each State party instead of the reference to any country since the Protocol could only bind States parties to it. This suggestion was also extended to include paragraph 2.

Paragraph 2

68. One delegation favoured deleting the second sentence since its substance was already covered by paragraph 1. This was opposed by others. It was suggested further to harmonize paragraphs 1 and 2 since there was reference to heads of diplomatic missions in the first paragraph and to diplomatic envoys in the second paragraph.

Paragraph 3

69. There were no proposals made to this paragraph.

Paragraph 4

70. There was general agreement in the Special Commission that this provision according to which immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall be granted to the members of the Tribunal is absolutely necessary for the unhindered exercise of their function. One delegation, however, felt that the reference to all acts done should be further specified.

71. The remaining paragraphs of this article were not discussed because of lack of time.

72. In the course of the article-by-article examination of the draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea, a number of other proposals of a drafting nature were made. They involved primarily suggestions to bring the text of one language in line with the text of the other languages and proposals designed to make the wording clearer without affecting the substance in any manner. Since the present document is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being so informed.

73. The Special Commission decided to continue the examination of the Draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea during the seventh session of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea.

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Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea

1. During the summer meetings of the Seventh Session of the Preparatory Commission the Special Commission continued the examination of the Draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea as contained in document LOS/PCN/SCN.4/WP.6. The Commission considered the last few articles of the draft (articles 16-18), a provision on the use of terms and the preamble. Thereafter, it discussed informal suggestions on the draft articles that had been submitted by delegations on conference room papers 24, 26, 27, 31, 33, 34 and 35.

Article 16 - Restrictions by a national government
Paragraph 2

2. During the discussion a number of delegations pointed out that the article should be supplemented by a provision to the effect that free movement to and from the headquarters of the Tribunal or the place where the Tribunal is sitting does not prejudge the right of Member States to take the measures they deem necessary for their security and the maintenance of public order.

Other delegations suggested that this matter should be taken up at a later stage in connection with the written amendments to this article (see para. 49 of this summary).

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Article 17 - Settlement of disputes

3. Introducing the article, the Secretary pointed out that article 17 followed the example of the Convention on the Privileges and Immunities of the United Nations, sections 29 and 30. However, the provision of the present paragraph 2 concerning the appointment of arbitrators had been slightly modified and does not exactly follow the wording of a similar provision in the Convention on the Privileges and Immunities of the United Nations to reflect recent UN practice.

Paragraph 1

4. One delegation suggested that a reference to article 2 should be added to paragraph 1 (a) (cf. doc. LOS/PCN/SCN.4/1989/CRP. 34). The concept of functional immunity was quoted in support of this suggestion and no objections were raised.

Paragraph 2

5. No comment was made on this paragraph.

Article 18 - Final provisions

6. The Secretary explained that this provision had been taken from the Convention on the Privileges and Immunities of the United Nations, sections 31 to 36. In response to the enquiry as to the reason why article 18, paragraph 1 only provided for accession to the protocol and not for ratification, it was explained by the secretary that this procedure reflected the common practice in this field.

Preamble

7. No comment was made on preambular paragraphs 1 to 5.

Paragraph 6

8. It was noted that it was unusual in international treaty practice for the preamble of a treaty to call for accession to it. In response, the Secretary stated that preambular paragraph 6 merely reflected the content of the resolution expected to be adopted by the Meeting of States Parties to the Convention and which would recommend to each State to accede to the protocol.

Article on the use of terms

9. With reference to an earlier decision of the Special Commission (cf. document LOS/PCN/SCN.4/L.13 para. 6) to include an article on the use of terms in the protocol, the Special Commission accepted the proposal that that article should basically follow the wording of article 1 of the Revised Draft Headquarters Agreement. (cf. doc. LOS/PCN/SCN.4/ WP. 5/Rev. 1). In drafting, the details of this article, account should be taken of the specifics of the subject regulated by the Draft Protocol.

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10. Subsequently, the Special Commission continued the consideration of amendments proposed on individual articles of the Draft Protocol. Other written and oral proposals were also discussed.

Proposals on article 2 - Property, funds and assets

11. The Special Commission first discussed the redraft of article 2 as contained in doc. LOS/PCN/SCN.4/1989/CRP.34. The delegation which submitted this redraft explained that it was designed to improve the structural logic and systematic arrangement of this provision.

12. Since no delegation objected to paragraphs 1 and 2 of the proposed redraft, the Special Commission decided to include them in the revision of the Draft Protocol.

13. The Special Commissions also agreed in principle to paragraph 3 of the proposed redraft which states that the premises of the Tribunal used in the exercise of its functions shall be inviolable. The Special Commission decided, however, to delete the words "in the exercise of its functions".

14. Some delegations supported the proposed redrafting of article 2, paragraph 4(a) dealing with the immunity of the Tribunal from legal process or execution. One delegation felt that the relevant provision from the Headquarters Agreement between Japan and the International Timber Organization could be incorporated into the Draft Protocol.

Other delegations however had misgivings about the proposed redraft. It was argued that this proposal went too far and that a provision could not be permitted which would enable legal proceedings to be taken against the Tribunal before a national court for a traffic accident caused by a motor vehicle or other means of transport belonging to the Tribunal or driven on its behalf. Disputes should be settled through negotiation between the Tribunal and the government concerned.

It was suggested that damage which may be caused by traffic accidents could be dealt with by an insurance coverage against third-party risks. Attention was drawn by way of example to article 18 of a draft convention prepared by the International Law Commission on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (cf. report of the ILC, doc. A/44/10). Only such damage as is not covered by insurance should be subject to legal process or execution pursuant to article 2, paragraph 4 (a). This proposal met with broad support in the Special Commission.

15. Various speakers expressed doubts about article 2, paragraph 4(b) as proposed in CRP.34. According to that proposal the Tribunal would not enjoy immunity from legal process or execution with regard to its commercial activities.

Some delegations felt that paragraph 4(b) should be deleted since under the Vienna Convention on Diplomatic Relations the Tribunal was not allowed to undertake commercial activities anyway.

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Other delegations suggested that instead of the formulation "commercial activities" the terms "acts of a private law character" or "acts of a commercial nature" should be used. This was objected to on the grounds that such formulations were imprecise and could therefore give rise to misinterpretation.

16. After completing the discussion of the proposals for article 2 as contained in CRP.34 the Special Commission again addressed itself to the suggestion to add a new supplement article 2 as worded in the Draft Protocol by an additional paragraph 3 to the effect that in case the Tribunal sits and exercises its functions in accordance with annex VI, article 1, paragraph 3 of the Convention, the State Party concerned should provide the appropriate facilities in accordance with international law. Upon request of the Tribunal, the State Party concerned shall conclude an agreement covering such matters without delay. (cf. document LOS/PCN/SCN.4/1988/CRP.24; LOS/PCN/SCN.4/L.13, paragraphs 19 and 20).

17. A number of delegations favoured the inclusion of such a provision in the Draft Protocol. They argued that this was a practicable proposal that was also in line with international practice. For the sake of the necessary flexibility and in order to cover informal arrangements it was suggested to replace the word "agreement" in the last line of the proposal by the word "arrangement". It was also suggested that this provision should become a separate article.

18. Other delegations were however of the opinion that the inclusion of such a provision in the Draft Protocol was superfluous. They argued that the Draft Protocol as already formulated is broad enough to take care of the case where the Tribunal, in accordance with article 1, paragraph 3, annex VI of the Convention, exercises its functions outside the host country. Moreover, article 18, paragraph 6 of the Draft Protocol (i.e. conclusion of supplementary agreements) could also cover these cases.

19. The prevailing view was that the provision proposed in CRP.24 should be included in the Draft Protocol. It was agreed to draft a separate article and to use the words "as soon as possible" in the last line of the proposal in place of the words "without delay".

Proposals on article 5 - Exemption from taxes and customs duties

20. Under article 5 the Tribunal, its assets, income and other property shall be exempt from all direct taxes on the understanding that such exemption shall not extend to taxes which are merely charges for services rendered.

One delegation proposed a new subparagraph (a) (cf. doc. LOS/PCN/SCN.4/1989/CRP.31) on the grounds that it was in line with the practice of INTELSAT.

21. Some delegations supported the proposed redraft while others held the view that the problem of indirect taxes was not solved by such a proposal.

22. Those who were against the proposal as CRP. 31 argued that the formulation used in the Draft Protocol reflected United Nations practice and was in accordance with the Vienna Convention on Diplomatic Relations. Opposing any change, other delegations pointed out that the present article 5, subparagraph (a) of the Draft protocol was patterned on article 183 of the Convention.

23. In conclusion, the Secretariat was requested to refomulate subparagraph (a) so that it would follow even more closely the last sentence of article 183, paragraph 1, of the Convention. The Secretariat was also requested to examine if the term "services" as used in article 183, paragraph 1 could be made more precise by replacing it with "public utility services".

Proposals on article 6 - Reimbursement of duty or tax

24. There were two written proposals to change this article (cf. doc. LOS/PCN/SCN.4/1988/CRP.26 and LOS/PCN/SCN.4/1989/CRP.31).

The Special Commission first took up CRP.26, which provides that in the important purchase of goods and services necessary for the official activities of the Tribunal, when the price of such goods or services includes taxes or duties, States Parties shall, if possible, grant exemption from such taxes or duties or provide for their reimbursement if requested by the Tribunal.

The delegation which proposed this amendment pointed out that it followed closely the wording of article 14 of the Draft Headquarters Agreement (cf. doc. LOS/PCN/ SCN.4/WP.5/Rev.1).

25. Some delegations felt that the proposed text was not clear. For instance, the term "important purchase" was too vague. The content of what could be treated as "important purchase" could only be determined by consultations between the Tribunal and the given host country.

Also, the formulations "if possible" and "if requested by the Tribunal" permitted various interpretations, which did not give the Tribunal any legal security.

26. The Special Commission decided on the inclusion of an article on the reimbursement of duty or tax in the Protocol on the grounds that under article 1, paragraph 3, annex VI of the Convention the Tribunal could also sit and exercise its functions elsewhere outside the host country. In such a case the Tribunal was no longer protected by article 14, paragraph 2 of the Draft Headquarters Agreement

27. In the consideration of article 6, the Special Commission addressed the proposed changes to that article as contained in doc. LOS/PCN/SCN.4/1989/CRP.31. Accordingly, in the fourth line of that article, the word "property" is to be replaced by "goods and services" since the term "property" did not include "services"

28. Some delegations supported this proposal, stressing that it was in accordance with article 183, paragraph 3 of the Convention dealing with the exemption of the Authority from taxes and customs duties. There were however, reservations against patterning article 6 on article 183 of the Convention.

The reason given was that the Tribunal was markedly different in character from the Authority and its Enterprise, both of which were strongly oriented toward commercial activities. Article 6 should take account of the nature of the Tribunal as a judicial organ without commercial tasks.

29. It was pointed out in the discussion that article 6 was in line with United Nations practice in this area. Attention was therefore drawn to article II of the Convention on the Privileges and Immunities of the UN. Reimbursement normally is not envisaged. This was only applicable when an important purchase had been made. Important purchases were transactions involving the acquisition of large quantities of goods or the spending of large amounts of money.

It was pointed out that the element of goods is usually covered by property. This however, does not include services rendered.

30. In the further discussion of this problem it was suggested that in the second and fourth lines of the provision the words "or services" should be inserted after "property". Another opinion was that the proposed addition should not apply to the second line of article 6. It was also suggested to replace the term "taxes on the sale" in the second line by "taxes on turnover". It was further suggested that article 34, subparagraph (e) of the Vienna Convention on Diplomatic Relations should serve as model.

31. As a result of the discussion the Special Commission adopted the following redraft of article 6:

Reimbursement of Duty or Tax

The Tribunal shall not, as a general rule, claim exemption from duties and taxes included in the price of movable and immovable property and of services. Nevertheless, when the Tribunal is making important purchases for official use of property, goods and services, on which duties and taxes have been charged or are chargeable, States Parties shall, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Proposals on article 7 - Facilities in respect of communications

32. In accordance with the previous agreement (cf. doc. LOS/PCN/SCN.4/L.13, para. 53), the Special Commission continued the discussion of proposals concerning article 7 of the Draft Protocol, which are contained in doc. LOS/PCN/SCN.4/1988/CRP.27.

In introducing the proposal the submitting delegation stated that the redraft took account of more recent practice in international relations, notably the grown importance of international organizations. It was favourably noted that the redraft refers in paragraph 2, to all means of communication submitted by the Secretariat. The original draft listed roughly certain means of communication. The Tribunal was therefore placed in a better position in the proposal.

In view of the proposal contained in CRP. 27, to change article 7 of the Draft Protocol, the suggestion made in CRP. 31 to delete the first paragraph of article 7 was withdrawn. The Special Commission proceeded to discuss CRP. 27 paragraph by paragraph.

Paragraph 1:

33. Some delegations supported the proposed redraft of article 7, paragraph 1, which provides that for the purposes of its official communications the Tribunal shall enjoy in the territory of each State Party treatment not less favourable than that which is generally accorded to intergovernmental organizations in the matter of priorities, rates and taxes applicable to mails and various other forms of telecommunications. It was emphasized in this context, as was done in the redraft, that in respect of official communications with international organizations the Tribunal would have to be given equal treatment.

34. Other delegations were however not in favour of the redraft. They argued that it was necessary to provide maximum protection as regards communications for the Tribunal and supported the basic provision of article 7, paragraph 1 of the Draft Protocol under which the Tribunal is accorded the same treatment as governments with regard to communications. They felt that the redraft presented in CRP. 27 was unclear since it contained the phrase "treatment not less favourable than that which is generally accorded to intergovernmental organizations". It was pointed out that there was no general standard for the treatment of intergovernmental organizations in view of their multitude and their widely divergent character in terms of functions, composition and competences.

35. In the course of the debate it was suggested that in order to find a generally acceptable formulation to the word "generally" should be deleted since it was too vague. Besides, the intention of the proposal was to make clear that the treatment of the Tribunal should not be less favourable than that which the State Party accords to any other intergovernmental organization.

One delegation reminded the Special Commission that the Tribunal was not an intergovernmental organization and the insertion of the words "any other" was not necessary. Finally, and taking into account the provisions of the Headquarters Agreement between the IAEA and Austria, section 13, the Special Commission agreed to draft article 7, paragraph 1 of the Draft Protocol as follows: "For the purposes of its official communications, the Tribunal shall enjoy in the territory of each State Party treatment not less favourable than that which the State Party accords to any intergovernmental organization or government in the matter of priorities, rates and taxes applicable to mails and the various forms of telecommunications".

Paragraph 2:

36. The Special Commission agreed in principle to the redraft of paragraph 2. which it provides that, for the purposes of its official communications the Tribunal may use appropriate means of communication and make use of codes, and that the States Parties shall impose no restrictions on the official communications of the Tribunal and shall not apply any censorship to such communications.

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It was suggested to redraft the first sentence in order to give the Tribunal the opportunity to use all means of communication.

As for the second sentence, the following amendment proposal was made: "The States Parties shall not apply any censorship or any other form of interception, interference or restriction of such communications."

The Special Commission adopted paragraph 2 of CRP. 27 as amended.

Paragraph 3:

37. This paragraph, which provides that the Tribunal may dispatch and receive its correspondence by courier or in sealed bags, and which shall have the same privileges and immunities as diplomatic couriers and bags, was accepted by the Special Commission without change.

Proposals on article 8-Members of the Tribunal
Paragraph 1:

38. One delegation held the view that article 8, paragraph 1, as worded in the Draft Protocol, was not in line with the provision of article 10, annex VI of the Convention. That delegation felt that it was necessary to differentiate between the privileges and immunities accorded to the members of the Tribunal in the host country under the Headquarters Agreement on the one hand and the privileges and immunities accorded to the Members of the Tribunal in states other than the host country on the other hand. In the host country, the Members of the Tribunal were to be treated like heads of diplomatic missions just as the statute of the ICJ provided for its judges. However, outside the host country of the Tribunal this kind of treatment was not practicable. Therefore, according to the proposal of that delegation, the Members of the Tribunal should, in the exercise of their functions in any country where they maybe should enjoy the privileges and immunities accorded to diplomatic agents accredited to that country. (cf. doc. LOS/PCN/SCN.4/1989/CRP.31).

A number of delegations were not in favour of this proposal. They preferred to keep article 8, paragraph 1 as contained in the Draft Protocol on the grounds that it was not justified to envisage different privileges and immunities for the Members of the Tribunal, depending on whether they host in the country or elsewhere.

In the end the Special Commission agreed to basically retain the present wording of article 8, paragraph 1. It did, however, accept the proposal put forward by one delegation that the first line of the paragraph should be redrafted to make it clear that the Protocol can impose obligations only on those states that are parties to it.

Paragraph 5:

39. The opinion was expressed that this provision was superfluous and should therefore be deleted (cf. doc. LOS/PCN/SCN.4 /1989/CRP.31) in view of the fact that article 8, paragraph 1 takes care of such a provision. If, under paragraph 1, the Members of the Tribunal were accorded diplomatic privileges

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and immunities, a speparate provision on taxation, as envisaged in paragraph 5, was therefore not required.

This view was shared by the Special Commission and it was agreed to delete paragraph 5.

Paragraph 7:

40. In discussing this paragraph the Special Commission recalled an earlier discussion (cf. doc. LOS/PCN/SCN.4/ L.13, para. 62), on the question of waiver. The Special Commission continued therefore to deliberate on the question of whether or not the Protocol should have a provision on the waiver of the privileges and immunities of the Members of the Tribunal. On this point the special Commission had before it a proposal contained in doc. LOS/PCN/SCN.4/1989/ CRP. 31. It envisages that the Tribunal alone shall be competent to waive the Immunities accorded to the Members of the Tribunal. The Tribunal, the proposal stated, not only has the right but is under a duty to waive the immunity of a Member in any case where in the opinion of the Tribunal the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded. The delegation which made this suggestion held the view that a provision on waiver was needed since an abuse of privileges and immunities by the Members of the Tribunal could not be excluded.

The practice of the Council of Europe could serve as a precedent for a rule on waiver.

Answering questions posed by other delegations the sponsor of the proposal explained that the proposal was not intended to introduce a kind of automatic relation between a penal offence by a Member of the Tribunal and the waiver of privileges and immunities. The Tribunals decision on a waiver would have to be taken unanimously. The point he stated, was merely to take a procedural precaution in such a case when immunity would impede the course of justice.

41. A number of delegations were not in favour of the inclusion of such a provision the Protocol. They stated that the ICJ does not have such a provision for the Judges of the court in the statute of the ICJ or in the rules of the court and that its absence had never produced practical difficulties in the decades ,that have passed since the ICJ was set up. As a judicial organ equal to the ICJ the Tribunal should follow the latter's practice. Moreover, the fear was expressed that a provision on waiver could be misused to put political pressure on the Members of the Tribunal, which would jeopardize the independence character of their functions.

With reference to the above-mentioned precedent quoted by the sponsor which was derived from the waiver provisions of the Council of Europe, the delegations emphasized that that body was only of a regional character and that it was composed of like-minded states. In contrast, the Tribunal was going to be a judicial organ intended to be universal in character.

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A number of delegations however conceded that precautions would have to be taken against a case where Members of the Tribunal commit grave offences or abuse their privileges and immunities. This, it was proposed should be left to the discretion of the Tribunal itself to make arrangements for such a case. The Tribunal may decide in its wisdom to include such arrangements in its Internal Rules which is envisaged under article 16, annex VI of the Convention.

42. Other delegations thought it necessary to incorporate an express provision on waiver into the Draft Protocol. They argued that practice has shown that abuses happen, it was therefore necessary to take precautions against such cases. A provision on waiver was in line with the concept of functional privileges and immunities which should apply to the Members of the Tribunal.

One delegation felt that the provisions of the ICJ on privileges and immunities would permit a waiver of the privileges and immunities of the Judges of the court. On this point attention was drawn to resolution 90(I) of the UN General Assembly dated 11 December 1946. Because of the formulation "in other cases" the last two sentences of paragraph 5(b) of that resolution could be interpreted to mean that a waiver of the privileges and immunities of the Judges of the court was admissible. In that sense there was a precedent that would have to be taken into account in drafting up the Protocol and that would justify the inclusion of a provision on the waiver of the privileges and immunities of the Members of the Tribunal.

43. Differing views were also expressed on the applicability of article 9, annex VI of the Convention concerning consequences of a member of the Tribunal ceasing to fulfil the required conditions . On the one hand the opinion was held that this provision could be applied in cases of abuse of privileges and immunities by a Member of the Tribunal, which would render a separate provision on waiver superfluous.

This view was not favoured by some delegations who argue that the application of article 9, Annex VI would remove the Member of the Tribunal from the bench for good while it was possible for a waiver of privileges and immunities to be pronounced only for a limited Period. Thus, all privlleges and immunities could be restored to a Member if and when it became clear, e.g. in criminal proceedings, that such a Member did not commit a penal or other offence.

44. In the end the Special Commission agreed to follow the rules and practice of the ICJ in the matter of waivers. It was decided to recommend to the Tribunal to include among the Internal Rules of the Tribunal provisions on the waiver of the privileges and immunities of Members of the Tribunal to the extent that there are such rules in the Internal Rules of the ICJ.

The Secretary was requested to ask the Registrar of,the ICJ for information on the legal foundations and the practice of the ICJ concerning a possible waiver of immunity for the Judges of the ICJ.

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45. At the request of one delegation a new draft article on taxation was discussed. It provides that the salaries, emoluments and allowances paid to Members and officials of the Tribunal should be exempt from income tax levied by States Parties from the date on which such salaries, emoluments and allowances become subject to an effective tax levied by the Tribunal on its own accord. The Parties to the Protocol may take such salaries, emoluments and allowances into account in calculating the amount of the tax to be levied on income from other sources. The Parties shall not be obliged to exempt from income tax pensions or annuities paid to former Members and former officials of the Tribunal. (LOS/P /SCN.4/1989/CRP.31/P. 4-5)

Some delegations supported this proposal. One delegation suggested, however, that the words "chargeable by any State Party" should be inserted in the first sentence after the word "income tax".

Other delegations objected to the first sentence of the proposed article; arguing that the immunity from taxation of the salaries, emoluments and allowances of the Members and officials of the Tribunal should not be subject to any unposed condition. It was also argued that the Tribunal will not have a right to tax the salaries, emoluments and allowances of Members and officers of the Tribunal. Such taxation would be incompatible with the privileges and immunities accorded to those persons.

No substantial objections were raised to the second and third sentences of the amendments.

Proposal on article 11 - Officials
Paragraph 6:

46. The Special Commission agreed to the proposal to change the beginning of the second sentence as follows: "The Registrar, with the approval of the President of the Tribunal, shall have..."

Proposal for a new article 14 bis

47. In doc. LOS/PCN/SCN.4/1989/CRP. 33 one delegation proposed a new article 14 bis. According to that proposal, it is the duty of all persons referred to in articles 8 - 13, without prejudice to their privileges and immunities, to respect the laws and regulations of the State Party in which they exercise official functions. They also have a duty not to interfere in the internal affairs of that State.

The delegation which introduced this proposal pointed out that this provision was taken verbatim from article 41, paragraph 1 of the Vienna Convention on Diplomatic Relations.

48. There was no comment on this proposal. The Secretariat was requested to incorporate it into the revision of the Draft Protocol.

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Proposed new paragraph 3 for article 16 - Restrictions by a national government

49. Under that proposal nothing in the Protocol shall prejudice the right of the governments of States Parties to take the measures they deem necessary for their security and the maintenance of public order (cf. doc. LOS/PCN/SCN.4/1989/ CRP. 31). In presenting this proposal the delegation concerned stated that the proposal was designed to guard against the abuse of privileges and immunities. It was argued that a provision of that nature was very common in comparable international agreements. In this connection attention was drawn, among other things, to the Headquarters Agreement between the, IAEA and Austria, section 47, paragraph (a) which states that the protection of the legal and social order of the host country calls for such an arrangement.

50. Some delegations were not in favour of the proposal on the grounds that it was too categorical and ultra vires. The provision gave the governments concerned unlimited powers over the Tribunal.

Another view was that the proposed arrangement went beyond the framework of article 16 and should therefore be given a different place in the Draft Protocol. This view met with the approval of the Special Commission.

51. Other delegations supported the suggestion as contained in CRP. 31. These delegations however favoured a balanced wording that would envisage certain obligations for co-operation and/or consultation between the government concerned and the Tribunal.

52. The prevailing view in the Special Commission was that a provision on the maintenance of security and public order should be included in the Draft Protocol.

The Secretariat of the Special Commission was requested to provide the concrete wording for such a provision. It should take guidance from section 47, paragraph 4 of the Headquarters Agreement concluded between the IAEA and Austria.

Another suggestion was that the proposed provision should be supplemented by the words "in accordance with the norms of international law".

Proposal for a new article 16 bis - Abuses of privileges and immunities

53. The proposal, which is contained in doc. LOS/PCN/SCN.4/ 1989/CRP .35, envisages, among other things, that if a State Party is of the view that there has been an abuse of privileges or immunities conferred by the Protocol, consultations shall be held between that State Party and the Tribunal. If such consultations fail to achieve a result satisfactory to the State and the Tribunal, the question shall be submitted to an arbitral tribunal.

The proposal, also provides that in case of abuse of privileges and immunities by representatives of States Parties outside their official functions in the country where the Tribunal is sitting, these persons may be required to leave.

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The delegation which submitted this proposal pointed out that it was patterned on Article VII (sections 24, 25) of the Convention on the Privileges and Immunities of the Specialized Agencies. The delegation made it expressly clear, that it would like to see the Members of the Tribunal also covered by the proposed arrangement. The provision was designed to exclude the abuse of privileges and immunities.

While a number of delegations supported the proposal reflected in CRP 35, others had reservations. In particular, the idea that this provision should also cover the Tribunal and its Members was objected to. These delegations felt that such a provision was not compatible with the principle that the Tribunal should enjoy the same treatment as the ICJ.

Another objection was that this article must not be applicable to representatives of States since only the sending State, and not the Tribunal, was entitled to act on behalf of these persons. Possibly, the receiving State could, in a case of abuse of privileges and immunities by a representative of a State, declare that person *persona non grata* as envisaged under diplomatic law.

54. Upon conclusion of the discussion on the Draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea submitted in document LOS/ PCN/SCN.4/WP.6, the Secretariat was requested to revise that draft in the light of the proposals and suggestions put forward during the discussion.

On the relationship between Protocol and Headquarters Agreement

55. At the end of the discussion one delegation raised the question as to the relationship between the Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea and the Headquarters Agreement between the Tribunal and the FRG. It was felt that the two documents would have to be harmonized. It was the understanding of that delegation that every State Party, including the host country, should become a party to the Protocol on Privileges and Immunities and that the Protocol was no substitute for the Headquarters Agreement. The Headquarters Agreement was considered by that delegation to be of a supplementary character to the Protocol. It was of the opinion that there were two different types of privileges, immunities and facilities:

On the one hand, the international family of nations would grant the Tribunal certain privileges and immunities in order to ensure its proper functioning everywhere. On the other hand, the host country would grant supplementary privileges and immunities relating to the nature of the seat of the Tribunal and to the fact that the persons in question reside in the host country or spend periods of time there. The privileges and immunities granted by the host country could not be less favourable than those set out in the Protocol.

The Headquarters Agreement was to cover only those points that were not dealt with in the Protocol or went beyond what was regulated in it.

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In the short exchange of opinions on this matter it was pointed out that the Protocol and the Headquarters Agreement each served a different purpose. Therefore, the two instruments were to be considered equal in status rather than sub-or super-ordinate to each other. It was true, however, that special importance was given to the Headquarters Agreement since it regulates the legal status of the Tribunal in the host country and since the Tribunal, as following the practice of other permanent courts like the ICJ, as a rule, would exercise its functions at its headquarters.

One view was that the Headquarters Agreement was the guiding document since its provisions were more detailed than those in the Protocol. In case of doubt the Protocol would have to be harmonized with the Headquarters Agreement.

56. In the course of the article-by-article examination of the draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea, a number of other proposals of a drafting nature were made. They involved primarily suggestions to bring the text of one language in line with the text of the other languages and proposals designed to make the wording clearer without affecting the substance in any manner. Since the present document is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions and these will be taken into account in revising the text. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being so informed.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea

(LOS/PCN/SCN.4/WP.6/Rev.1)

1. At its ninth session, Special Commission 4 began the examination of the revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6/Rev.1). It concluded its task at the tenth session, where a final draft was requested, taking into consideration the views expressed. It was later published as document LOS/PCN/SCN.4/WP.15/Add.3 (or LOS/PCN/SCN.4/WP.6/Rev.2) and entitled "Final draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea".

2. When introducing the revised paper, the Secretary stated that the new paper was an attempt to reflect all the proposals where an agreement had been reached along with necessary adjustments. He also said that, as had been requested, the Secretariat had taken some guidance from document LOS/PCN/SCN.4/WP.5/Rev.1 on the Headquarters Agreement between the Tribunal and Germany, but keeping in mind that both documents addressed two different audiences. The Secretary reminded delegations that the legal mandate to draft a protocol on privileges and immunities was contained in the Convention at its Annex VI and in particular in article 10 of the Statute of the International Tribunal for the Law of the Sea (hereinafter referred to as "the Tribunal"). He also referred delegations in that regard to the introductory note of document LOS/PCN/SCN.4/WP.6.

3. Beginning a detailed description of the new text, the Secretary pointed out that a new article on the use of terms had been added, dealing with different

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definitions. He stated that basically the thrust of the Protocol had not been changed but that a separate article on the waiver had been drafted. He also pointed out that the question of arrangements with Governments had been addressed.

4. He then referred delegations to documents LOS/PCN/SCN.4/WP.6, WP.5/Rev.1, L.13 and L.13/Add.1, CRP.24, 27, 30, 31, 34 and 35, as documents needed for the consideration of this new, revised Protocol on Privileges and Immunities. He also pointed out that it had been a very delicate task to include reference to the Vienna Convention, on the one hand, and to international law, on the other.

5. Delegations were called upon not to look too intensively at provisions that had not raised any controversy, in order to allow more time for those which were problematic. It was also suggested that whenever amendments were proposed by delegations and no agreement was reached in the Commission, working groups would be created on an ad hoc basis to deal with the matter, and then report back to the Commission as a whole.

Preamble

6. Delegations were referred to paragraph 5 of document LOS/PCN/SCN.4/L.13 to refresh their memory as to the agreement arrived at with regard to the preamble.

7. One delegation wanted to know if the reference to "State Party" in the second and third paragraphs would mean a country which would accede to the Protocol. He was supported by another delegation, who suggested that the matter of the definition of "State Party" should be resolved at article 1 on the use of terms, since the article was also ambiguous. Another delegation wondered what had been the motivation in putting the final "look-alike clauses" in the last preambular paragraph. Another delegation was of the view that the reference to Annex VI in the fourth preambular paragraph should be deleted. He was supported by another representative, who also wished the last preambular paragraph to be reformulated.

8. The Secretary answered that, when looking at existing precedents, this constituted standard procedure. With regard to the fourth preambular paragraph, it was agreed to delete the reference to Annex VI since it already appeared in the first preambular paragraph.

Article 1. Use of terms

9. The Secretary pointed out that the chapeau of article 1 should read "for the purpose of this Protocol", not "Agreement". He also pointed out that with regard to paragraph 1 (d) and the definition of the "States Parties", he was of the view that no distinction should be made between the States parties to the Convention and States parties to the Protocol. He insisted that the Protocol was to be adopted by the Meeting of States Parties to the Convention.

10. Some delegations supported his analysis. However, one delegation pointed out that there was a difference between this article and article 23. Article 1

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stated "For the purposes of this Agreement", which therefore meant that in subparagraph (d) the State Party would be party to the Agreement [Protocol].

11. Another delegation suggested redrafting article 1 (d) as follows: "States parties" means States that have consented to be bound by this Protocol and for which this Protocol is in force". He added that necessary adjustments would be made to article 23 (1) and suggested the following: "This Protocol is submitted for accession to every State Party to the Convention as understood in article 1 of the Convention."

12. Another delegation was of the view that problems would arise whenever the Tribunal decided to sit, temporarily, somewhere other than at Hamburg; this would raise the necessity of ad hoc agreements. He was therefore in favour of a redraft of article 1 (d).

13. The main concern of some delegations was what would happen if a State was party to the Convention and not to the Protocol. This concern was also linked to the views expressed by other delegations that wished the Tribunal to be independent even from the United Nations Convention on the Law of the Sea (hereinafter referred to as "the Convention"), which meant that they wished for States to be able to be party to the Protocol without being necessarily party to the Convention. This view was strongly opposed by many other delegations.

14. Therefore, delegations insisted upon a clarification of paragraph 1 (d), and many proposals for redrafting the article were once again put forward.

15. It was pointed out that subparagraphs (h) and (j) of article 1 concurred with the idea that "States Parties" meant States parties to the Protocol. Other delegations pointed out that taking into account article 23 of the revised Protocol, a "State Party" could only be a State party to the Convention that would have acceded to the Protocol. If the accession was not effected, the Protocol would not apply to that State.

16. Delegations finally seemed to agree that there was a need for parties to the Convention to become parties to the Protocol. This would not be automatic, but through signature or accession. What was needed was a drafting of article 1 (d) that would be clear and precise but acceptable for most delegations.

17. The issue was taken into informal discussions, with a suggestion to discuss the issue later on within an ad hoc working group if the Commission could not reach a consensus. Some delegations recalled that the Protocol was to be open to every State. A definition of "States Parties" was also contained in the Convention, article 2, paragraph 1. It was also recalled that the text of article 1 of the Protocol on Privileges and Immunities had been drafted without any prejudgement, with the only idea that the Convention was the basic text for the Protocol.

18. One delegation was of the view that the latter comment restricted the definition of States parties, while it was not necessary to link both texts i.e., the Convention and the Protocol. It was pointed out that States not parties to the Convention should be able to appeal to the Tribunal. The formula

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at article 1 (d) should therefore consider as States parties to the Protocol other countries than those States which were party to the Convention.

19. Another delegation criticized article 1 (d) as drafted because it stated that parties qualifying for the Protocol were automatically to be parties to the Protocol. This was stated to be in contradiction with article 23 where a simple accession was required to be party to the Protocol. He therefore suggested including in article 1 (d) a reference to article 23 and to the fact that article 23 referred also to entities as enumerated in article 305 of the Convention.

20. In drafting article 1 (d) it was suggested to keep in mind situations raised as in article 6, paragraph 2, article 19, paragraphs 2 and 3, article 23, paragraphs 1 and 2 and preambular paragraphs 2 and 3.

21. The Commission was informed that consultations with the Chairman of the Preparatory Commission on the International Seabed Authority and the International Tribunal for the Law of the Sea had been conducted on the basis of article 1, paragraph 2, of the Convention (see LOS/PCN/WP.49/Add.1). At that time, delegations were informed of the possible confusion between Member States and "States Parties" to an international organization as referred to in article 1, paragraph 2 and subparagraph 2. To make the distinction, it was suggested to use the wording "acceding States". But the Commission was warned that there was not the same link between the Convention and the Tribunal as there was between the Convention and the Authority. He explained that there could be physical or juridical persons parties to the same Protocol.

22. It was therefore up to the Commission to decide if it agreed on whether: (a) all States could be parties to the Protocol; (b) States that had signed the Convention and were parties to it could enjoy rights under the Protocol; and (c) States that had not signed the Convention could be part of the Protocol.

23. One delegation, summing up the different views, stated that the objective of the Protocol was to give application to Annex VI. He then insisted that there should not be a formal linkage between the Protocol and the Convention, meaning that the Protocol should not be dependent on the Convention. It was then suggested that article 1 (d) be amended to read as follows: "'States Parties to the Protocol' shall mean the States who have fulfilled the conditions laid down in article 23 of this Protocol". 1/

24. On the question of how the Tribunal could perform its functions in a State which was not a party to the Convention, reference was made to articles 20, 21, 22 and 23 of the Statute of the Tribunal and article 291 of the Convention. It was pointed out that the Convention itself stated that those States who were not party to the Convention, as well as entities, could submit a dispute to the Tribunal.

25. One formulation for article 1 (d) and article 23 was proposed in document LOS/PCN/SCN.4/1992/CRP.46, according to which article 1 (d) would read: "'States parties' means those States which have completed the formalities for accession prescribed in article 23." Article 23 would read: "This Protocol is open to every State Party to the Convention for accession."

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26. One delegation found the word "formalities" inappropriate and suggested the following instead: "'States Parties' means those States that have agreed to be bound by the Protocol and for which the Convention is in force."

27. One delegation however insisted upon retaining the important reference to article 23.

28. In the end, with regard to paragraph 1 (d) and the definition of "States Parties", the Commission generally agreed upon the following wording: "'States Parties' means those States which have consented to be bound by the Protocol, in accordance with article 23, and for which the Convention is in force."

29. Subparagraph (g) was also generally agreed upon taking into account the agreement reached on subparagraph 1 (d).

30. The Commission also generally agreed on subparagraphs (a), (b), (c), (e), (f), (i), (j), (k), (l), (m), (n) and (o) of paragraph 1. On subparagraph (h), one delegation was of the view that the term "Government" was difficult to define. When considering the different occasions where it appeared (see article 11, para. 4, article 12, para. 4, article 5 (e) and article 9, para. 1 and article 10, para. 1 in the French version) the word "Government" did not have the same meaning, and in particular with regard to article 6. It was later generally agreed that it was not necessary to give any definition since there already was a delimitation of the term "States Parties".

Article 2. Juridical personality and capacity

31. The Secretary introduced the article and said that it had been based on the original draft in WP.6. However, as suggested by the Commission, paragraph 2 had been deleted and transferred to the administrative rules of the Tribunal. It was also recalled that there had been a general consensus not to change the heading.

32. The Commission generally approved article 2.

Article 3. Immunity of the Tribunal, its property and assets

33. The Secretary stated that the article had been based on the discussions in the Special Commission. Suggestions introduced through document LOS/PCN/SCN.4/1989/CRP.34 were reflected in this new article and in this regard attention was drawn to the new paragraph 4 which had been based on the draft Convention on the diplomatic courier and the report of the International Law Commission on that Convention. This represented a new trend in international activities.

34. Starting with the heading of the article and then paragraphs 1, 2 and 4, the Commission generally approved the article as it stood. However, some delegations wanted paragraph 3 to stand alone as a separate article since it stated an important principle. The Secretariat submitted a redraft of the article entitled "Inviolability of the premises of the Tribunal" and an

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article 3 bis entitled "Immunity of the Tribunal, its property and assets" (see LOS/PCN/SCN.4/1991/CRP.43).

35. The Commission generally approved both articles.

Article 4. Exercise of the functions of the Tribunal outside the host country

36. The Secretary stated that the article had been drawn from earlier provisions in WP.6. The issue in this article was to respond to the situation where the Tribunal might function in a country which was not a party to the Protocol. This issue had also been touched upon in the discussion on article 1 (d).

37. One delegation wanted to know if the article applied to a country not party to the Protocol or to the Convention. He was of the view that article 1, paragraph 3, of the Convention did not clarify that point. He suggested therefore that the word "State" be used instead of "State Party". He explained that the Tribunal should be able to sit in any country, and if that country was not a party to the Protocol, an ad hoc arrangement should be made between that State and the Tribunal.

38. It was argued that, in that case, the Tribunal would be imposing its will on a State, by deciding to sit in that country.

39. One delegation was of the view that the above situation was covered by the last part of the article which begins: "Upon request ... as soon as possible". However, he also was of the view that the two situations should be clearly delineated and differentiated.

40. Another delegation was of the view that there should also be taken into account the situation where a country which was not a party to the Convention appealed to the Tribunal. He referred to article 20, paragraph 2, of the Statute of the Tribunal which opened the Tribunal to entities other than States parties. He was also concerned by the last sentence of article 4, which stated that a country not party to the Protocol could be obligated by the Protocol.

41. At that point the Secretary stated that the Protocol had been based on existing precedents, i.e., the Convention on Privileges and Immunities of the United Nations, which is of universal character. Of course, the situation of the Tribunal was slightly different. Article 1, paragraph 3, of the Statute allowed the Tribunal to sit anywhere, including in a country which was not a party to it. Article 4 was drafted to cover practical or administrative arrangements. He nevertheless reminded delegations that the problem demanding solution would arise when the Convention was not universal and the place where the Tribunal sat was not even a party to the Convention.

42. Two categories of suggestions were therefore supported by delegations: (a) to delete the word "Party" which would, however, broaden the article; (b) to have a separate paragraph that would cover the situation where when the Tribunal sat in a country which was neither a party to the Convention nor a party to the

Protocol. In this case it should also be stated that the country would then have to accede to the Protocol or conclude, with the Tribunal, another arrangement.

43. One delegation recalled that similar discussions had been held on document LOS/PCN/SCN.4/1989/CRP.24. He was of the view that reference to article 20, paragraph 2, of the Statute, as had been done, did not cover the situation. The Commission had to decide whether the Tribunal would sit elsewhere, i.e., in a country not party to the Protocol. In this case, as stated by another delegation, the country that has agreed that the Tribunal might sit in its territory would conclude arrangements as soon as possible. In this case, it would also be more accurate to say in article 4, last sentence: "conclude arrangements with the Tribunal etc. ...".

44. Another delegation stated that the obligation to conclude arrangements with the Tribunal referred not only to a State not party, but also to any country which agreed to host the Tribunal, provided that that State was not Germany.

45. It was recognized that article 4 enunciated a strong commitment that the Tribunal be able to enjoy privileges and immunities wherever it might decide to sit. The formula to be chosen should not be restrictive and should open the Protocol to non-States parties. However, some delegations rejected the situation where the State would not be a party either to the Convention or to the Protocol.

46. In the end, it was left to the Secretariat to draft a compromise taking into consideration the proposals made and the two situations, i.e., when the Tribunal sat in the territory of a State party and when the country was not a State party. The definition of "State Party" was taken as that agreed by the Commission in article 1 (see para. 28 above).

47. The Secretariat should take into consideration the fact that some States wanted the article to admit States that were neither party to the Convention or to the Protocol. In this regard it was reminded that for the sake of efficiency the Commission had agreed that States which were parties in a dispute but which were not party to the Convention could be considered under the Protocol.

48. A proposal was temporarily put forward by the Chairman to add at the end of article 4 the following: "Every State may become party to the Protocol and the Convention."

49. This proposal was provisionally adopted pending discussions, inter alia, on article 23. Some delegations were of the view that it was a reasonable compromise with universal openness. In that regard, one delegation insisted that, rather than being restrictive, the Protocol should be open for signature to those entities enumerated in article 305 of the Convention.

50. It was agreed that there would no longer be a paragraph 2. It was also pointed out that the matters dealt with in article 4 would be discussed again when dealing with articles 21 and 22.

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51. Thus, document LOS/PCN/SCN.4/1991/CRP.43 was subsequently circulated containing a redraft by the Secretariat of, inter alia, article 4 and article 4 bis.

52. The Commission generally approved article 4 as it was drafted in the above document. Article 4 bis was considered unnecessary.

Article 5. Archives

53. The Secretary reminded delegations that they had agreed that the provisions of this article should not be unduly elaborated. It was also recalled that, in 1988, there had been a decision to retain article 3 of document WP.6 without changes.

54. To a question raised by one delegation, it was stated that article 5 would be generally agreed upon with the understanding that the Protocol would have to be harmonized with document LOS/PCN/SCN.4/WP.5/Rev.1, in order to clarify that the word "wheresoever" did not imply an imposition of will on a third party.

Article 6. Funds and freedom from currency restrictions

55. In introducing the article the Secretary stated that it had not been too controversial. The revision reflected the discussions in the Special Commission. He drew the attention of the Commission on the deletion of the word "gold", as had been requested by the Commission. The title has also been slightly modified so that it would read more smoothly.

56. One delegation drew attention to the French version of the title, which was said to be incorrect. It was generally agreed that necessary adjustments would have to be made.

57. Paragraph 1 of article 5 was also generally approved by the Commission.

58. With regard to paragraph 2, it was stated that its drafting was in accordance with the summary of discussions in document LOS/PCN/SCN.4/L.13.

59. One delegation pointed out, however, that taking into consideration the definition of "States Parties" adopted by the Commission (see para. 28 above), the words "to this Protocol" should be deleted. The Commission generally agreed to the deletion.

Article 7. Exemption from taxes and custom duties

60. In introducing the article, the Secretary stated that it was still basically the earlier text from LOS/PCN/SCN.4/WP.6. However, it attempted to accommodate some of the views expressed during extensive discussions on the matter. Mention was also made of the Commission's decision to draft the article in two paragraphs (see Chairman's summary of discussions (LOS/PCN/SCN.4/L.13,

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para. 42)). Delegations were also asked in the first paragraph, third line, to insert "charges" instead of "changes". There was no comment on the heading.

Paragraph 1

61. One delegation sought a clarification as to why the words "public utility services" were used in the article. This delegation was of the view that the terminology, i.e. "services rendered" in the Convention (article 183) should be used in this article as well as in document LOS/PCN/SCN.4/WP.5/Rev.1, article 14, paragraph 4. Some of the delegations supported his point of view.

62. However, the Secretary pointed out that this matter had already been extensively discussed (see LOS/PCN/SCN.4/L.13/Add.1, para. 23). It was also pointed out that the changes in the wording might also bring about a change in the status of the Tribunal.

Paragraph 2

63. Two suggestions were made with regard to the paragraph. The first one was a drafting comment, requesting that the words "in the territory" be used instead of "country". The second suggestion, which was to delete the last sentence of the paragraph and add at the end of the first sentence the words "including its publications" gave rise to some debate.

64. Some delegations were of the view that the last sentence meant that the Tribunal's publications were in addition to articles imported or exported and that, therefore, it should not be deleted. Moreover it was pointed out that not only did the last sentence deal with a different category, i.e., publications, but also the whole paragraph was linked to article 4. One delegation stated that if on one hand the Commission were to decide that the Tribunal could sit in a country which was not party to the Protocol, then the paragraph should change; if on the other hand the opposite was the case, then the paragraph should remain as it stood.

65. Therefore, taking into account the decision reached with regard to article 4 (see para. 46 above), it was generally agreed to use the words "in the territory" and to retain paragraph 2 as currently drafted.

Article 8. Reimbursement of duty or tax

66. In introducing the article, the Secretary stated that it had not given rise to much controversy although there had been thorough discussions on the word "important". He added that the text reflected those discussions and the decisions taken, as reflected in document LOS/PCN/SCN.4/L.13/Add.1, paragraph 31. The text, however, had been generally adopted by the Commission as currently formulated.

67. One delegation apologized for raising once again issues concerning an article which had already been agreed upon, but he was of the view that it was important to redraft article 8, including the title.

68. Some delegations supported him. He then suggested that the new title should read: "Reimbursement of duties and/or taxes". The rest of the article would read:

> "The Tribunal shall not, as a general rule (delete "claim exceptions" and add) be exempted from duties and taxes which are included in the price of movable and immovable property and of services. Nevertheless, when the Tribunal is making (delete "important" and say:) major purchases for official use of property, goods and services on which duties and taxes have been charged or are chargeable, States Parties (delete "whenever possible") make appropriate administrative arrangements for the remission or reimbursement of the amount of duties and/or taxes paid by the Tribunal."

69. He explained that the aim of his changes was to take into account excise duties and the fact that States were sovereign in the matter.

70. Another delegation wished to add in the English version, at the fourth line, the word "such": "... on which such duties and taxes ...", so that a differentiation could be made with respect to article 7.

71. Other delegations raised the question of non-conformity between the different language versions, such as between the English, the French and the Arabic.

72. The Secretary stated that the matter of language harmonization would be taken care of.

73. One delegation suggested adding, after the words "goods and services" the words "of substantial value". He was supported by other delegations.

74. Another delegation was of the view that the content of the article did not correspond to the title because of certain phrases or concepts that were not quite precise. He noted a certain contradiction between the title, containing the word "reimbursement", and the phrase "the tribunal shall not claim exemption". He added that although Germany had a value-added tax on goods, it had a separate practice for the diplomatic corps. He pointed out that the Tribunal should provide for the same treatment.

75. He was supported by another delegation, which suggested a title with a neutral phraseology, such as "purchases of the Tribunal".

76. Some other delegations did not find any contradiction between the title and the text.

77. One delegation pointed out the ambiguous character of the word "important". He suggested its deletion because that which was important could vary from country to country. He suggested instead that it be stated that the reimbursement should be "in accordance with national laws and regulations".

78. He was supported by one delegation, who wished to know who would be deciding, between the Tribunal and the country, on which purchases were important and which were not. He insisted that this fell under the competence

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of the country and suggested the following wording: "in accordance with the laws of the country".

79. The Secretary pointed out that the language used in article 8 was consistent with the language used in the Convention on Privileges and Immunities of the United Nations. He explained that the current language provided for more flexibility on both sides. He added that, with regard to the suggestion to add the words "substantial value", this would restrict the meaning of the article and small purchases over a period of time might not be reimbursable. He also explained that the word "claim" had been used because there was no automaticity; a request would have to be made before a reimbursement was effected. The Secretary appealed to delegations to take the above comments into consideration.

80. Some other delegations supported the content and intent of article 8 but still had some difficulties with its formulation. Further suggestions were made and it was agreed to keep the article in abeyance pending a compromise to be drafted by the Secretariat.

81. The Secretariat did so in document LOS/PCN/SCN.4/1991/CRP.43.

82. The Secretary pointed out that the wording "important purchases" had been changed to "major purchases" and that "whenever possible" now read "as soon as possible".

83. The Chairman took note of the Commission's general approval of the changes and of the new text of article 8.

Article 9. Facilities in respect of communications

84. The Secretary stated that article 9 had been drafted on the basis of document LOS/PCN/SCN.4/1988/CRP.27. Article 13 of the International Atomic Energy Agency (IAEA) Safeguards Agreement had also been taken into account. He referred the delegations to document LOS/PCN/SCN.4/L.13/Add.1, paragraphs 35, 36 and 37, for previous discussions and decisions on the article.

85. As a matter of form, some delegations pointed out that in the French version there was no third paragraph. One delegation insisted, however, that his delegation did not view the first paragraph as necessary. He noted that the paragraph had been taken directly from the Convention on Privileges and Immunities of the United Nations, which was now outdated.

86. Another delegation did not agree on the equivalency drawn between the intergovernmental organization and the Government. He explained that the Tribunal should only be equated with other tribunals and the way their privileges and immunities were dealt with. With regard to paragraph 2, he pointed out that the Commission should only be concerned about using its communications without "interference" or "censorship" and not about "interception" or "restrictions".

87. The Chairman appealed to delegations not to reopen a debate that had already taken place. He reminded them that they had already generally agreed on the article.

Article 10. Members of the Tribunal

88. The Secretary stated that the article had been drafted on the basis of the Chairman's summary of discussions (L.13/Add.1). He pointed out that the first paragraph had been an agreed text. A consequential change to reflect the discussions had only been introduced. He continued that paragraph 6 was the same draft as in document LOS/PCN/SCN.4/WP.6 and that paragraph 7 merely gave the same privileges to ad hoc members.

89. He also communicated to the Commission that after consulting with the International Court of Justice (ICJ) he had been informed that there had never been any problem with the privileges and immunities of the judges and that there had thus never been any waiver.

Title

90. There were several proposals regarding the title of the article. Some delegations were of the view that the words "ad hoc" should be added, while others opposed it because, as in the Security Council, there was no differentiation between permanent and non-permanent members.

91. Another delegation was of the view that since the article was related to privileges and immunities, those two words should be added to the title. This was considered cumbersome by one delegation. Another delegation suggested deleting article 13 and adding those provisions to article 10, with, consequently, a new title.

92. One delegation referred the Commission to the different definitions of "members" and "ad hoc members". He stated that article 1 (j, k) on the use of terms, defines "Members" as "an elected member of the Tribunal as referred to in article 2 of the Statute and article 2 of the Rules"; "ad hoc members" meant "a person chosen under article 17 of the Statute for the purpose of a particular case".

93. The Chairman stated that those comments would be taken into account when redrafting the article.

Paragraph 1

94. A lengthy debate was opened on this paragraph although it had already been generally approved.

95. Some delegations were of the view that, basically, there should be consistency between document LOS/PCN/SCN.4/WP.6/Rev.1 and document LOS/PCN/SCN.4/WP.5/Rev.1 when dealing with the same subject-matter, in this case, with privileges and immunities.

96. One delegation pointed out that the privileges given to the members of the Tribunal covered more than they should according to Annex VI, article 10, of the Convention. He stated that full enjoyment of privileges and immunities was given to the members of the ICJ only when residing at headquarters. The same delegation also objected to the use of the words "heads of diplomatic missions" and preferred the expression used in the Vienna Convention of 1961: "diplomatic agents". He argued that there was no longer any differentiation between the immunities and privileges of heads of mission and other diplomats.

97. Another delegation was concerned here also by the lack of harmonization and wished his comment to apply mutatis mutandis throughout the provisions of the article. He suggested deleting the word "prerogatives" because, contrary to the word "facilities", he did not find the term sufficiently clear.

98. In the second sentence of paragraph 1, he raised the question of the reference to international law and to the Vienna Convention. He was of the view that it was not necessary to refer to both since the Vienna Convention was so widely accepted. He then suggested replacing the word "adopted on" by "of".

99. Another delegation however did not agree and insisted upon retaining the reference to international law with the words "in accordance with International Law". He explained that there might be practices which would have developed into customary international law.

100. Another delegation was of the view that the reference to international law was too general. He insisted however that if the reference was to be retained, then it should be used with consistency throughout the text and in the same order when cited with the Vienna Convention.

101. With regard to the comment that members of the Tribunal only enjoyed prerogatives when at headquarters, and after a definition of the latter term in international law was given, some texts were cited to illustrate that such had not been the practice. Thus, reference was made to a letter by the Minister for Foreign Affairs of the Netherlands which first stated that the judges of the ICJ shall enjoy the same privileges and immunities as the heads of diplomatic missions; another reference was made to a General Assembly resolution which, complementing in a way the above letter, stated that the privileges and immunities should be enjoyed by the judges of the ICJ when residing in some other country than at headquarters for the purpose of holding themselves available.

102. It was argued that those documents had appeared prior to the Vienna Convention and therefore should not constitute a valid reference.

103. The Secretary stated that the redraft of the paragraph had been based on the discussions held by the Commission on the same matters which were now being raised once again. He explained that, in this article, reference had been made to the Fourth Protocol of the Council of Europe which referred to the European Court of Human Rights where the expression "head of diplomatic missions" was used. He pointed out that some of the protocols of the Council had been adopted in the 1960s, subsequent to the Vienna Convention.

104. One delegation argued that the point of granting facilities, prerogatives and immunities was to facilitate the judges' carrying out their functions. He also stated that changing the privileges would introduce inequality between the Tribunal and the ICJ. In this regard, he recalled that President Amerasinghe had said that the Tribunal shall have equal precedence with the ICJ (ref. A/CONF.62/WP.9/Add.1, para. 30). He insisted that this was a matter of prestige not to be overlooked.

105. It was left to the Secretariat to attempt to redraft a new paragraph that would take into account the above comments.

Paragraph 2

106. Two categories of questions were raised with regard to the paragraph. One delegation wanted some harmonization between paragraph 2 and paragraph 3. He suggested deleting in paragraph 3 the words "other than their own" and retaining paragraph 2 as drafted, but adding at the end of paragraph 2 the restriction introduced in paragraph 3. Another delegation however was of the view that, although he agreed that the restriction found in paragraph 3 should be added in paragraph 2, he would prefer a rewording of the whole paragraph. He suggested stating at the beginning of paragraph 2 the following: "Members, their spouses, their family and member of their household ..."; the end of paragraph 2 would then read: "other than that of their own or which they are permanent residents."

107. The Secretary stated that the latter proposal would give rise to difficulties because some members of the Tribunal could be resident in two countries.

108. Because of the complexity of the matter, some delegations suggested a separate article dealing with that issue.

109. One delegation raised the issue regarding the family members. He wanted to know what kind of "facilities" the member of the Tribunal would be given with regard to his family members. He also found ambiguous the use of the word "they" since it was not clear if it referred to the members or their families.

110. In that regard, a suggestion was made to delete the words "forming part of their household" as well as the words "for leaving the country where they happen to be".

111. The Chairman pointed out that the issue raised was of importance and he wanted to know if the Commission was in favour of a separate article concerning the members and their families.

112. It was argued that the privileges or immunities with regard to the travel of the member could also apply to the member when residing in his own country. In this connection, a delegation drew the attention of the Commission to article 38 of the Vienna Convention. He stated that if they were travelling, the members should be accorded such privileges and immunities as would cover any, and only, official acts.

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113. It was agreed that the Secretariat would attempt to write a compromise text on the paragraph.

Paragraph 3

114. There were few comments on the paragraph. However, one delegation was of the view that under the proposal to redraft the paragraph, i.e., replacing the sentence that begins with: "Members of the Tribunal, for the purpose of holding themselves available ...", by: "for the exercise of their functions", paragraph 3 would become superfluous because it would only be a repetition of paragraph 1.

115. Another delegation stated that paragraph 3 could only lead to confusion and suggested that it be deleted. He was supported by other delegations on the condition, for some of them, that the word "country" would refer to "States Parties". It should be impermissible to oblige non-States parties to grant privileges and immunities to the Members of the Tribunal.

116. The Secretary proceeded to identify on which grounds article 10 had been drafted. He stated that the first paragraph was general, the second one dealt with transit, the third with the Members holding themselves available but not performing actual duty for the Tribunal, etc. He pointed out that the paragraphs dealt with different situations. He asked the delegations how the countries would be able to deal with the situation described in paragraph 3 if the paragraph were to disappear.

117. It was agreed that the Secretariat would attempt to redraft a compromise on this paragraph as well.

Paragraph 4

118. After reference was made to the Chairman's summary of discussions (document LOS/PCN/SCN.4/L.13, para. 38), a few drafting suggestions were put forward and generally agreed upon with regard to this paragraph. Thus, one delegation suggested substituting the words "no longer performing those functions" by "no longer Members". In this regard, another delegation recalled the necessity to use the capital "M" for "Members" and another, to choose the word that would be used throughout the text, i.e.. between the words "duties" and "functions".

119. The Secretary stated that the drafting changes would not only be reflected in the text of article 10, but also throughout the whole document.

Paragraph 5

120. There were no comments on paragraph 5, but it was agreed that adjustments in accordance with proposals to other paragraphs' proposals would also be made.

Paragraph 6

121. One delegation doubted the necessity of the paragraph and suggested that it be merged with article 16.

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122. The Secretary reminded the Commission that there was no waiver for the Members of the Tribunal. He specified that article 16 dealt with the waiver provisions, which could only apply from article 11 to article 14.

123. In the end it was agreed that the language of paragraph 6, which had been taken from a standard clause in another Protocol, would remain as it stood. Eventually, the words "facilities and prerogatives", if used in paragraph 1, would also be utilized in this paragraph.

Paragraph 7

124. In response to the question of one delegation, the Secretary explained that the paragraph dealt with the instance where a Member was involved in a case when his term came to an end. The paragraph stated that he should nevertheless be able to continue serving on the case.

125. One delegation took the opportunity to raise the issue of the waiver. He made a general statement that the Tribunal not only had the right but was under the duty to waive immunities of the Members in any case where, in the opinion of the Tribunal, the immunities would impede the carrying out of justice. As a point of reference, he cited article 9 of the Statute of the Tribunal. He insisted that "this reminder would not reduce the prestige and independence of the judges". On the contrary, it would give them, in fact, a sort of guarantee. He was supported by several other delegations.

126. The Chairman read out an abstract of paragraph 44 of document LOS/PCN/SCN.4/L.13/Add.1, where the Commission had agreed to follow the rules and practice of the ICJ in the matter of waiver of privileges and immunities. He added that it had been decided to recommend to the Tribunal to include in its internal rules provisions on the waiver of privileges and immunities of the Members to the extent that such rules existed for the ICJ.

127. One delegation pointed out that, moreover, nothing in the Convention and the Statute was clear-cut enough that it would lead one to believe that the Third United Nations Conference on the Law of the Sea had wanted waiver provisions for the Tribunal. He referred to the provisions of the Statute of the ICJ which at its Article 18, states the following: "No member of the Court can be dismissed unless, in a unanimous opinion of the other members, he has ceased to fulfil the required conditions. Formal notification thereof shall be made to the Secretary-General by the Registrar. This notification makes the place vacant." He insisted that there were no provisions for the waiver; in article 6 of the Rules of Court, which refer to Article 18, there was an elaborate explanation of the procedure to follow in order to implement Article 18.

128. Another delegation was of the view that if delegations were to insist on the matter, his delegation would suggest, and agree to, including in the Protocol article 9 of the Statute of the Tribunal (Annex VI), mutatis mutandis. However, he still thought that it was not necessary to do so because the issue was linked to the functions of the Members of the Tribunal, which could not be waived.

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129. Some other delegations supported the above comments on the ground that the independence of the judge was focal and that even the Vienna Convention made a distinction in its article 31 between penal, civil and administrative immunities. Specific exceptions were stated with regard to the waiver of immunities.

130. Some other delegations, however, felt strongly that it was important to have waiver provisions. They insisted that there was a legal lacuna to be filled in this matter. They argued that it was not unreasonable to make waiver provisions even if it had not been done by the ICJ and that there had not been any practical case. It was stated that all precedents of the ICJ should be discussed and not transferred to the Tribunal without careful consideration.

131. Some delegations pointed out that they were perfectly aware that the question of the waiver of privileges and immunities was not merely a theoretical matter.

132. One delegation shared the view that waiver provisions, even if not detailed, should be provided for the Members of the Tribunal because, contrary to the judges of the ICJ, the Members of the Tribunal were allowed to exercise other functions during the time when they were not working for the Tribunal. In that period of time, they would be enjoying full immunities. It was thus reasonable to have a safeguard in case there was a serious violation of those privileges and immunities. He agreed, however, that the waiver should be decided by the Tribunal as a whole.

133. Another delegation recognized that the immunities were not only functional, but also absolute, as stated in article 10, paragraph 3. He stated that this absolute approach was the reason why some States had not ratified the 1975 United Nations Convention on functional immunities. He asked the Commission if it was its intention to draft a document that could not be ratified in the future, i.e., a mere academic exercise.

134. At this point, one delegation stated that although he hoped that no case of waiver of the Members' immunities would arise, he understood the reasons of those who wanted waiver provisions. He pointed out that in this case his delegation was of the view that it should be left to the Tribunal to take care of the issue.

135. Another delegation wanted to know how article 10, paragraph 3, and paragraph 16 of document LOS/PCN/SCN.4/WP.8/Add.2 could be reconciled without a provision on the waiver of the Members' privileges and immunities.

136. In the end the Chairman took note of the lack of decision on the above matter and he suggested that a special summary on the question should be presented to the Meeting of States Parties; he stated that delegations could refer to his summary of discussions on the matter.

137. However, the Secretary drafted a new compromise on the entire article 10, entitled "Members and ad hoc members" (LOS/PCN/SCN.4/1991/CRP.43). The Secretary, with regard to the new document, drew the attention of the Commission to the fact that it should avoid creating confusions since the Vienna Convention

referred to "members" as members of the families, while the Protocol referred to "Members" as members of the Tribunal. That was why it was necessary to detail, in the earlier paragraph 2, the notion and say "Members and members of their families, i.e., spouses, dependent relatives etc. ... who are also concerned by the privileges and immunities". The new text was more accurate and stated as follows: " ... for the purpose of holding themselves at the disposal of the Tribunal for the exercise of their functions etc. ..." The new wording covered the hypothesis of the Members of the Tribunal being nationals of the host country; they would be under its sovereignty as long as it did not interfere with their duty to the Tribunal. The Secretary added that there had been no major problem with paragraphs 4, 5 and 6, and as to paragraph 7, only the words "mutatis mutandis" had been added.

138. With regard to paragraph 7, one delegation was concerned by the fact that a judge might continue to exercise his functions without a mandate. He was not convinced by the reference to Annex VI of the Convention and its article 5, paragraph 3.

139. It was agreed that there would be a reformulation of the provision, including a direct reference to Annex VI, article 5, of the Convention. 2/

140. Another delegation expressed reservations with regard to paragraph 2.

141. However, in the end, the article as redrafted was approved by the Commission, taking into consideration that some delegations had expressed their reservations on some paragraphs of the new article 10.

142. The Chairman took note of the general approval of article 10 by the Commission, with the above comments.

Article 11. Agents representing parties, counsel and advocates designated to appear before the Tribunal

143. The Secretary stated that in the original paper there had been different articles for the various categories of people involved in this unified new article. After careful review and taking into account discussions held with regard to the relevant articles of document LOS/PCN/SCN.4/WP.5/Rev.1, this article had been drafted combining the two categories of persons.

144. There were no comments on the title of the article.

145. Some delegations stated, as a general comment, that the Commission was being too generous in its granting of privileges and immunities. In this regard, several formulations were pointed out throughout the different paragraphs.

146. One delegation objected to the use of the words "in particular", which led to the belief that the list of privileges and immunities was not limited. Therefore, it was suggested that these words be deleted.

147. This proposal was supported by some delegations.

148. One delegation insisted that there should be equality between the categories of persons. He stated that if a distinction could be made for an agent who might be a diplomatic agent, there should not be any distinction between a counsel and an advocate. Privileges and immunities should also be limited to functional immunities. He questioned the meaning of the words "diplomatic envoy" and wished to know if the term constituted a new entity.

149. Another delegation requested the inclusion in paragraph 1 (e) of the question of a visa, so that the arrival of a judge might not be unduly delayed.

150. Another delegation wanted to know what was the meaning of "any acts done by them" in paragraph 1 (b). He found the privileges and immunities granted in this paragraph too sweeping.

151. With regard to paragraph 1 (a), it was stated that there should be an exemption for flagrante delicto. It was also pointed out that the Commission should use the language of the Convention, article 182 in particular, and use the words "currency restrictions" instead of "currency transactions".

152. One delegation was of the view that article 11 had been drafted in an understandable way but pointed out that it was usually impossible to foresee all details. He suggested using the less elaborate wording of paragraph 42 of the Statute of the ICJ. He also thought that, since the formula in paragraph 3 of article 10 was too vague, the criteria under which functions would be exercised should be the focus of article 11. He therefore suggested that paragraph 1 end with the words "their functions".

153. In the end, it was agreed that the Secretariat would redraft paragraph 1 taking into account the suggestions put forward at the current as well as previous sessions. Thus, it was also agreed that paragraph 1 (e) would be harmonized with paragraph 1 (f) with regard to the words "if the State concerned". It was also agreed to incorporate paragraph 6 in paragraph 1 (g).

154. It was furthermore pointed out that paragraphs 2 and 3 were discriminatory and too broad. Many delegations were of the view that those paragraphs were not clear or constituted a repetition.

155. Some proposals were made to redraft both paragraphs. One delegation, however, said that paragraph 3 should be deleted since it repeated 1 (g).

156. With regard to paragraph 2, it was suggested that it should also be deleted. One delegation however pointed out that there might be cases where a counsel might have to act as a diplomatic agent, which had certain legal qualifications. Another delegation insisted that it would create unequal treatment to give to them special rights.

157. In accordance with the suggested deletion of paragraphs 2 and 3, it was pointed out that the issue in fact was whether a counsel would need a safeguard clause that would not be prejudicial to the other status which he enjoyed. It was suggested that, instead of two paragraphs, there should be included similar provisions to those of the Vienna Convention on Consular Relations, which deals

with consular functions being provided by diplomatic agents. Attention was also drawn to article 75 of the same Convention.

158. It was considered a mere technical matter to redraft the whole text as two separate articles.

159. The Commission finally agreed that paragraphs 2 and 3 would be deleted but that the Secretariat would draft another article on the basis of article 75 of the Vienna Convention on Consular Relations to cover the situation referred to by some delegations. The Commission approved the deletion throughout the text of the term "envoy", to be replaced by the word "agent". The word "prerogatives" would also be deleted in paragraph 5.

160. Paragraphs 4 and 7 would remain as they were.

Article 12. Officials

161. In order to harmonize and to emphasize the official capacity of the officials' functions, a suggestion was made to merge paragraph 1 and paragraph 5 of article 12. It was also suggested to add at paragraph 5 (b) the words "as are engaged by officials of the United Nations". It was understood that in redrafting the paragraph the Secretariat would try to use, as much as possible, the language of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) or the Committee for Programme Coordination (CPC). It was pointed out that the United Nations taxation system, although complex, could be of reference in exempting the officials from emoluments taxation.

162. It was further suggested to merge and redraft in paragraph 2, the two sentences concerning diplomatic agents. One of those proposals read as follows: "The Registrar and any official of the Tribunal shall be accorded privileges and immunities, facilities and prerogatives as accorded to diplomatic envoys, in accordance with international law and the Vienna Convention on Diplomatic Relations, adopted on 18 April 1961."

163. The reference to the diplomatic agents was agreed upon, along with the merger of the two sentences in paragraph 2.

164. Based on the reasoning that paragraph 3 of article 12 granted excessive rights to spouses and children, and also because other paragraphs, such as paragraphs 5 (c) and (f), already dealt with those rights, it was suggested to curtail paragraph 3 or delete it altogether.

165. The Commission agreed on the deletion of paragraph 3 and the redrafting of paragraph 5 as appropriate.

166. Paragraph 4 was generally agreed upon as drafted.

167. Although the merger of paragraph 5 with paragraph 1 was generally agreed upon, some delegations, however, wanted to make sure that some of their concerns were adequately reflected in the paragraph.

168. Thus, the question was raised as to the meaning of the definition of the word "relatives" in paragraph 5 (d). Some delegations wanted the word to include children. Some other delegations insisted upon referring to "dependent children" while others wanted the word to include elderly dependent relatives. It was pointed out that the formulation in paragraph 5 (d) was not in line with formulations adopted earlier on the same matter. Some delegations suggested harmonizing whatever language was used in that regard with the language concerning the privileges and immunities of the International Seabed Authority or on the basis of the Vienna Convention and the language used for privileges and immunities for specialized agencies.

169. One delegation suggested the following language as a definition for the word "relatives": "the spouses and dependent members of their families".

170. It was recalled that the Tribunal was not a body of the Authority and also that harmonization had been requested, but with the Headquarters Agreement. In that regard, one delegation insisted that both documents would have to be harmonized with Plenary documents since within the Preparatory Committee four documents on privileges and immunities were currently being drafted.

171. The Secretary pointed out that delegations should not worry about what would be the basis for the harmonized provisions. He stated that the Secretary could refer to the exchange of letters between the ICJ and the Netherlands that stated: "The wives and unmarried children of members of the Court, the Registrar and the higher Officials of the Court, when of non-Netherlands nationality, shall receive the same treatment as the head of the family if they live with him and are without profession. The household of the family (governesses, private secretaries, servants et cetera) occupy the same position as is accorded in each case to the domestic staff of diplomatic persons of comparable rank." It was pointed out that the "household" was given a detailed definition.

172. Attention was also drawn to the provisions of the Convention on Privileges and Immunities of the Specialized Agencies, which states that: "... Be immune together with their spouses and relatives dependent on them from immigration restriction and alien registration."

173. In the end, delegations were divided as to whether the word "relatives" would include dependent children or minor children; whether it would encompass also elderly dependants and in that case, because of too broad a meaning, would the word "relatives" not have to be defined in article 1.

174. The Secretariat issued a redraft of the article in document LOS/PCN/SCN.4/1991/CRP.44. Some delegations opposed article 12, paragraph 4 (b). One delegation suggested simply deleting it.

175. The Chairman reminded delegations that, previously, article 12 had been almost totally agreed upon. He appealed to delegations not to reopen new discussions on old issues.

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176. One delegation nevertheless objected to the privileges and immunities, outlined as in this article, as being made to encompass spouses and dependent children (para. 4 (d)).

177. Another delegation suggested moreover using in paragraph 5 (f) the word "accorded" instead of "given", and with regard to paragraph 5 (e), deleting the words "in accordance with international law and practice" because that was a wide formulation.

178. In the absence of consensus, the article was nevertheless provisionally approved by the Commission, with the understanding that any redraft would take into account the outcome on article 10.

Article 13. Experts appointed under article 289 of the Convention

179. In introducing the article, the Secretary stated that it had already been discussed at length. In article 13, the experts under article 289, had been equated with advisers of the ICJ, as reflected in the Chairman's summary of discussions on the matter. He concluded that no major changes had been made and assured delegations that there would be some harmonization with regard to the terms diplomatic "agents" or "envoys" (paras. 1 (e) and 2) would be harmonized.

180. There were no comments on the title of the article.

Paragraph 1

181. It was agreed to delete the words "in particular" in the French version. More substantively, some delegations were of the view that paragraph 1 (b) was too broad as to the privileges and immunities being accorded to the experts. One delegation was of the view that the experts should be liable for statements made, even when they were not connected with their functions.

182. Another delegation pointed out that some words were missing in paragraph 1 (e); he stated that "currency transactions" should be mentioned in this paragraph, and idem at article 11, paragraph 1 (f). He said that in this paragraph the sentence should read as follows: "The same immunities as are accorded to diplomatic agents". More precisely, it was requested that the language in article 13, paragraph 1 (e), be brought in line with article 11, paragraph 1 (f).

183. Another delegation suggested that paragraph 1 (c) be harmonized with article 11, paragraph 1 (c). He also added that, in so doing, the Commission should take into consideration the privileges and immunities of the Authority. It was pointed out that, in taking into consideration article 15, the immunity in paragraph 1 (c) might be jeopardized.

184. The Secretary replied that the presentation of article 13 was taken from the ICJ practice that differentiated between the advisers and the representatives of States. Article 13 made the separation between representatives of States and entities.

185. One delegation was of the view that article 13, paragraph 1 (c), should remain as drafted while article 11, paragraph 1 (c), should be harmonized with it. Another delegation thought article 13, paragraph 1 (a), should be based on article 11, paragraph 1 (f).

186. It was generally agreed that paragraph 1 (a) of article 13 would be harmonized with article 11, paragraph 1 (f). With regard to the comment that paragraph 1 (b) covered too wide a range, it was agreed that the Secretariat would redraft the paragraph, taking into account the above concern and the discussions held on the matter.

187. With regard to paragraph 1 (a) of article 13, it was recalled that the problem in that paragraph was linked to the understanding of the word "household". It was agreed that whatever phraseology or definition was approved, it would be used throughout the text.

187. It was also understood that when taking article 13, paragraph 1 (c), as the basis for the harmonization of language with article 11, paragraph 1 (c), the words "relevant to the exercise of their functions" in the latter paragraph would be deleted.

188. As to paragraph 1 (e), it was agreed that the subparagraph would be redrafted, taking into consideration the proposal to include a provision on non-seizure of personal baggage.

189. The Commission also agreed to redraft a subparagraph (f) which would attempt to incorporate paragraph 1 of article 12.

Paragraph 2

190. The Commission agreed to the drafting of this paragraph, taking into consideration any decision taken on paragraph 1 (d) with regard, in particular, to the question of repatriation facilities.

Article 14. Witnesses, experts and persons performing missions

191. The Secretary stated that article 14 was in accordance with the discussions held previously on the article and reflected agreements achieved during those discussions.

192. There was no comment on the title, which was generally accepted by the Commission.

193. With regard to paragraph 1, some delegations requested the deletion of the words "in particular" in the French version as misleading. This was generally accepted by the Commission.

194. One delegation stated that his delegation was strongly opposed to the linkage made in this paragraph with the diplomatic envoys. His delegation was not against granting facilities in case of repatriation. He insisted that, contrary to the experts being nominated by parties, the experts in this case

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should not be treated as diplomats or heads of missions. He also objected to the reference to the Vienna Convention. It was clear to him that the reference to articles 13 and 14 did not include the families of the experts involved.

195. It was recalled that no satisfactory conclusion had been reached as to the definition of the people concerned in article 14.

196. The Secretariat submitted a redraft of article 14 (LOS/PCN/SCN.4/1991/CRP.41). Paragraph 2 of article 14 was replaced by the following wording: "On journeys in connection with the accomplishment of their missions, experts, witnesses and persons performing missions by order of the Tribunal enjoy such immunities as may be required to ensure their transit or return."

197. It was agreed that the Secretariat would harmonize both texts of article 14 in documents LOS/PCN/SCN.4/WP.6/Rev.1 and LOS/PCN/SCN.4/1991/CRP.41. The Chairman took note of the new text and the suggested amendments.

Article 15. Respect for law and regulations

198. The Secretary stated that the article reflected the agreement reached during previous discussions and contained in document LOS/PCN/SCN.4/1989/CRP.33.

199. The article 15 along with its title, was generally approved by the Commission as drafted.

Article 16. Waiver

200. The Secretary introduced the article and said that it had been drafted on two understandings; first, there could be no waiver for the Members of the Tribunal (judges); and secondly, for the other officials of the Tribunal the waiver would be provided for in the Protocol. He referred delegations to the thorough discussions held on the different paragraphs of the article. He also pointed out that the article had been drafted on the basis of article 22 of document LOS/PCN/SCN.4/WP.5/Rev.1.

201. There were no comments on the title of the article.

202. Although it was clarified that article 10 did not, concern the Members of the Tribunal, one representative stated that his delegation's acceptance of article 16 would depend on the solution adopted with regard to article 10.

203. It was recalled that, with regard to article 10, there had been a suggestion to put forward all the options and opinions on the matter and submit them to the Meeting of States Parties.

204. One delegation was of the view that paragraph 1 of article 16 set out a fundamental principle while the other paragraphs constituted applications or modalities. Therefore, his delegation wished to have paragraph 1 as an independent article between articles 15 and 16.

205. Another delegation referred to the French version and wanted to know if the Tribunal had the right and the duty to waive the immunities. It was explained that the language had been taken from the Geneva Convention on Privileges and Immunities of the United Nations, article IV, section 14 and article V, section 20. However, the Secretary stated that any harmonization between the language versions would be taken care of. In this regard, one delegation called attention to the fact that any modification would also have to be reflected in paragraph 3.

206. Another delegation supported the above and stated that it was only the State that decided, since it was its prerogative and not its duty. Therefore, his delegation was also of the view that the wording "not only has the right but is under a duty" was not an appropriate legal wording. He continued that even though this language had been taken from the Geneva Convention, the Commission should not lose this opportunity to redraft with a view to improving the text.

207. However, in the end, paragraph 2 and 3 were generally accepted as drafted by the Commission.

208. One representative stated his concern with regard to paragraph 4. He was of the view that in the French version there was confusion between the decision being taken unanimously and then by two thirds of the members present. In this regard, the English version was correctly drafted. But looking at the English version, his delegation also noted another confusing drafting detail; he asked about the meaning of the word "available"; did it mean members who are present, or those who were at the disposal of the Tribunal?

209. It was suggested that the two versions be harmonized. In that regard, the following language was suggested: in French: "à l'unanimité de ses membres présents qui doit comprendre une majorité des deux-tiers."; in English: "by a unanimous decision of the members present which shall include a majority of two thirds of the Members of the Tribunal".

210. This redrafting was generally approved by the Commission, along with paragraph 4 thus modified (ref. LOS/PCN/SCN.4/1991/CRP.41).

211. The Commission also generally agreed on paragraphs 5 and 6, as drafted.

212. One delegation, however, wanted to know what was the decision on the proposal of an article 16 bis as contained in document LOS/PCN/SCN.4/1989/CRP.35. The proposal dealt with the situation where there was an abuse of privileges. It was recalled that the matter had already been discussed (see LOS/PCN/SCN.4/L.13/Add.1, paras. 49-52 and 53-54). There had been arguments in favour and against, and in the face of the inconclusive situation, the matter had not been reflected in this article. No clear support was given by delegations while some of them did in fact object to it; also, no proposal or reformulation had been put forward.

213. However, some delegations once again insisted that there be an article dealing with abuse of privileges.

Article 17. Taxation

214. There was no comment on the title. One delegation however had two remarks to make on the article. The first line was too vague and general; he wanted to know what were the salaries, emoluments and allowances, who would pay them (the Tribunal?), who would allow for the exemption of taxes for the officials of the Tribunal, etc. His delegation also wanted to express its strong reservations with regard to the article. He stated that current experience in the matter showed that there could not be exemption of any taxes for the members of an international organization without some kind of compensation. Moreover, the exemption would only concern tax on salaries. His delegation therefore suggested the following drafting in French: "Les traitements ou émoluments versés seront exonérés de l'impôt sur le revenu à la date où ils seront assujettis à un impôt effectif par le Tribunal, etc" (see LOS/PCN/SCN.4/1989/CRP.31). He also stated that paragraph 2 repeated what had already been provided for in article 10 when referring to the fiscal residence.

215. Furthermore, other delegations found the article unacceptable despite the reference to previous discussions where it had been stated that the opportunity of tax exemption should not suffer from any restriction.

Article 18. Laissez-passer

216. One delegation stated that it did not want the proliferation of *laissez-passer*. Another delegation requested that the asterisk disappear because the Tribunal was to be independent from the United Nations and, in that case, it would be improper to use the United Nations travel document. He also wanted the Commission to examine carefully when it would be necessary to use the *laissez-passer*.

217. Although the title was generally agreed upon, the discussions on it and the asterisk were suspended pending the finalization of the text on the Agreement on the relationship between the United Nations and the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.9 and WP.9/Add.1).

218. One delegation suggested the deletion of paragraph 2, taking into account previous comments. This deletion was generally agreed upon by the Commission.

219. Another delegation wanted to know if the omission of the Deputy Registrar was a voluntary one. It was clarified that the same privileges would apply to the Deputy Registrar only when acting as the Registrar.

220. Some other delegations asked about the necessity to give certificates to those travelling for the Tribunal. It was suggested to introduce a distinction in paragraph 3. One of the proposals was to use the word "letters" instead of "certificates" and it was pointed out that the distinction had already been made with regard to the status of the people travelling. It was also explained that the paragraph reflected the practice of the United Nations, but in order to be clear it was suggested to introduce the words "and the other people" and then to delete the second part of the paragraph. It was also stated that there were indeed several types of *laissez-passer* and that none of them were the same.

221. In the end, paragraph 3 was generally accepted by the Commission as drafted.

Article 19. Cooperation with the authorities of States Parties

222. The Secretary introduced the article by reminding delegations that during a previous meeting of the Commission delegations had requested that the article conform to international practice. At that time there was only one paragraph. The new article comprised three paragraphs covering cooperation with the authorities of States parties.

223. The title was approved, although it differed from the earlier article 15 of document LOS/PCN/SCN.4/WP.6, which dealt with the same matter.

224. The Commission generally agreed also on paragraph 1.

225. One delegation did not agree on paragraph 2 owing to the fact that, as drafted, the text seemed to imply that the President of the Tribunal could call for security measures in any case. His delegation was of the view that this could only apply in relation to the functions of the Tribunal. He suggested deleting paragraph 2. Some other delegations were of the same view since they argued that the provisions of paragraph 2 were not usually included in a document on privileges and immunities. One delegation, however, although agreeing on the deletion of paragraph 2, was of the view that adjustments would have to be made to paragraph 3.

226. The majority of delegations did not object to the deletion of paragraph 2.

Article 20. Maintenance of security and public order

227. The article was generally approved by the Commission as drafted.

Article 21. Restrictions by a national Government

228. The Secretary introduced the article and stated that article 21 was former article 16 in document WP.6. He reminded delegations that there had been a proposal to divide the article in two. Therefore, he pointed out that paragraph 2 was based on a proposal contained in document LOS/PCN/SCN.4/1989/CRP.31, page 4. He also reminded delegations that at that time there had not been any objections to the proposal. (See the Chairman's summary of discussions, L.13/Add.1.)

229. One delegation was concerned by paragraph 1 which was found to be too general. He suggested redrafting it as follows: "No administrative or other restrictions shall be imposed by any State Party on the free movements of the Members of the Tribunal ... except after having obtained the consent of the President of the Tribunal."

230. With regard to paragraph 2, many delegations pointed out the inconsistencies between the paragraph and the title. Some delegations were in favour of a simple deletion of the paragraph taking into consideration that it was not consistent with the title. Also, article 10 covered the case of Members of the Tribunal while article 12 dealt with the Registrar.

231. However, other delegations were in favour of redrafting the paragraph and the title. One delegation suggested dividing the article in two. The first article would be entitled "Movements, facilities and restrictions"; the second would effect an amalgam between the Members of the Tribunal and the Registrar who shall, in the matter of customs and exchange control, be given the same facilities as those accorded by States Parties to their officials on temporary missions.

232. In the end, the deletion of paragraph 2 was generally agreed upon by the Commission along with the suggestion to give to the article another title that would read as follows: "Free movement" or Libre déplacement" (see LOS/PCN/SCN.4/1991/CRP.42)

Article 22. Settlement of disputes

233. The Secretary pointed out some corrections to be made to the text. He suggested that article 22, paragraph (a), second line should read: "disputes arising out of contracts and relating to the application of the provisions of article 3 ...". He also suggested replacing the word "differences" by "disputes" and deleting the word "Convention".

234. As a general request, it was agreed to harmonize the Protocol with the Headquarters Agreement. Also, one delegation pointed out that the text could be harmonized with the Protocol on Privileges and Immunities of the International Seabed Authority and in particular with article 30. He suggested that the Secretariat take care of the matter.

235. Paragraph 1 (a) and 1 (b) was then generally agreed upon by the Commission.

236. One delegation pointed out that "a Tribunal of three arbitrators" did not have the same meaning as a "group of three arbitrators". His delegation was also concerned by the lack of a fixed time-frame for the party to answer a request. He suggested that in article 22, paragraph 2, the Commission could adopt the formula of the Protocol on the Authority so that no party could paralyse the procedure. The new wording would read as follows: "Any dispute ... which is not settled by consultation, negotiation or other agreed mode of settlement within three months following such request by one of the parties to the dispute ...". He was of the view that article 22 should be adjusted, *mutatis mutandis*, in relation to article 30 of LOS/PCN/WP.49.

237. The proposal to include a time-frame of three months was supported by several other delegations.

238. It was finally agreed that since the Protocol and Privileges and Immunities of the Tribunal would be the most relevant, the Secretariat was requested to

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make the necessary changes to this article taking into account the above discussions.

Article 23. Final provisions

239. The Secretary stated that there had been no previous discussions on the article. He explained that the article had been based on sections 31 and 36 of the Convention on the Privileges and Immunities of the United Nations. He drew the attention of delegations to the proposals contained in document LOS/PCN/SCN.4/1992/CRP.46. He also referred them to the first introduction to the article, as contained in L.13/Add.1.

240. The title was generally accepted by the Commission.

241. One delegation wanted to know if it was necessary to have a final provision calling for accession to the instrument since the Protocol was to be an independent instrument and not part of any other Convention. It was explained that the question had already arisen in relation to the "accession", as reflected in document L.13/Add.1. It had been noted at that time that it was unusual in an international treaty to call for accession to it. The Secretary had stated that paragraph 6 of former article 18 merely reflected the content of the resolution expected to be adopted by the Meeting of States Parties to the Convention and which would recommend to each State to accede to the Protocol. He reminded delegations that there had been three views on the status of the Protocol; some thought that the Protocol was separate from the Headquarters Agreement; others that the Headquarters Agreement was the main document and the Protocol an addition to it; and, finally, others were of the view that the Protocol was above the Headquarters Agreement. No decision had been taken with regard to that issue.

242. One delegation insisted that the Protocol could not be part of the Headquarters Agreement, as suggested. He stated that the Protocol was part of the United Nations Convention on the Law of the Sea and therefore States could not be called upon to accede to it.

243. He was supported by other delegations, who agreed that the question was linked to the definition of "States Parties" because if the States parties were parties to the Convention on the law of the sea, then they were already parties to the Protocol. He insisted that since the Convention was not sufficiently clear on the matter, delegations needed to take a clear-cut decision on the matter.

244. The Chairman drew the attention of delegations to the document dealing with the Authority, which differentiated between "States parties" and "State Party".

245. Some delegations insisted that the Protocol had been intended to be independent from the Convention. One delegation stated that the international practice in this regard was for signature to occur first, followed by accession.

246. Other delegations stated that they were aware that the same questions had also been raised with regard to the Authority. It had been suggested that the matter should be left to the Meeting of States Parties.

247. Returning to the adopted procedure for the consideration of articles, the Chairman asked the delegations to comment on the title of article 23. The title was provisionally approved pending more substantial discussions on the content of the article.

248. Upon the introduction of paragraph 1, it was said that the paragraph followed, mutatis mutandis, the same provisions as for the Authority. The Chairman informed delegations on the consultations he had had with the President of the Preparatory Commission on the definition of "States Parties". 3/

249. Therefore, taking into account the definition adopted by the Commission on the meaning of "States Parties", 4/ one delegation then suggested the following wording in paragraph 1 of article 23: "The Protocol is submitted to every State Party to the Convention for accession." He stated that, with the accepted definition of "States Parties", the Protocol, as it should be, would stand on its own and not be dependent on the Convention; there would be no formal linkage between them.

250. Another delegation asked, since the Protocol defined the relationship between the Tribunal and other States, how would the Tribunal be able to perform its functions in a State not party to the Convention? His attention was drawn to article 20 of the Statute of the Tribunal which stated: "The Tribunal shall be open to States Parties. The Tribunal shall be open to entities other than States Parties in any case expressly provided in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case." The same delegation was also referred to articles 22 and 23 of the Statute and article 291 of the Convention. It was explained that States could apply to the Tribunal and that the Tribunal might proceed to the spot for certain judicial functions.

251. Another delegation insisted that it would be more logical to think that the fact alone that a party appeared before the Tribunal, or that a State submitted a dispute to the Tribunal, showed that the jurisdiction of the Tribunal had been recognized. Therefore, that State or entity should be a party to the Convention.

252. It was also clarified that, in any event, a State party to the Convention did not automatically become party to the Protocol; it had to accede to it. It was also pointed out that only article 23 mentioned the form by which States could become party to the Protocol.

253. In the end, the suggested proposal for article 23, as contained in LOS/PCN/SCN.4/CRP.46, was generally approved by the Commission.

254. The Commission thus concluded its consideration of the revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6/Rev.1).

255. In the course of the article-by-article examination of the revised draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea, a number of other proposals of a drafting nature were made. They involved primarily suggestions to bring the text of one language in line with the text of the other languages and proposals to make the wording clearer without affecting the substance in any way. Some of these are not reflected in the present summary. Although the Secretariat has committed itself to introducing also all the consequential changes, and since the present document is a summary of discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations.

256. The Secretariat has maintained a complete record of all suggestions and these have been taken into account in revising this text. In this regard delegations are invited to refer to document LOS/PCN/SCN.4/WP.15/Add.3 or document LOS/PCN/SCN.4/WP.6/Rev.2.

257. However, should any representative feel that an important matter has been omitted, the Chairman would appreciate being informed.

Notes

1/ For the formulation of article 23, see para. 253 below.

2/ For the new draft of the entire article and the paragraph, see document LOS/PCN/SCN.4/WP.15/Add.3, article 12, paragraph 8.

3/ For the outcome of the consultations and the decision of the Commission, see paras. 21, 23 and 27 above.

4/ See note 3 above.

Annex

VISIT OF THE REGISTRAR OF THE ICJ TO SPECIAL COMMISSION 4

1. During the ninth session of the Preparatory Commission, Special Commission 4 received the visit of Mr. Eduardo Valencia Espina, Registrar of the International Court of Justice (ICJ). His visit was to give to delegations first-hand information about the ICJ. Delegations would seize the opportunity to ask him about the aspects of the would-be relationship between the ICJ and the Tribunal. Delegations were reminded that they had requested the Secretariat to draft a relationship agreement between the ICJ and the Tribunal.

2. On this matter, the Registrar stated that he had received the first draft of the agreement between the United Nations and the Tribunal (LOS/PCN/SCN.4/WP.9 and Add.1). His first reading of the document seemed to indicate that it would not be necessary to draft a supplementary text between the Tribunal and the ICJ. He added that although the Court had not had time to examine it, he wanted to draw the attention of the Commission to the fact that already some of the matters were of relevance on the Court. He stated that the draft would raise questions as to its implications and consequences for the Court. The Registrar reminded the Commission that although the Court was an independent body, any agreement with the United Nations could affect the Court and would require the Court to give its opinion if not its consent.

3. He stated that the Charter of the United Nations gives preponderance to the Court over any other judicial body (ref. Articles 1 and 3 of the Charter) and therefore, in this case, over the Tribunal, which had only been created by a Convention. He pointed out that some conflict of interests might arise between the two institutions. He concluded by saying that he would convey to the Court any impressions or remarks that the delegations would like to make regarding the matter.

4. One delegation wanted to know if article 287 of the Convention on the Law of the Sea did not resolve the question of coexistence of both institutions. Another delegation inquired what was usually the practice of the ICJ when dealing with law of the sea matters. He also wanted to know if it was possible, based on the will of parties, that one court rather than another be deemed immediately competent.

5. The Registrar stated that both institutions would have sovereignty as to the definition of their jurisdiction, which might lead to conflict of jurisdiction. In the case, for example, of prompt release of vessel and crew, who would take the provisional measures? There would arise a question of competence.

6. It was true that article 287 of the Law of the Sea Convention had settled the issue of the coexistence of both institutions by providing for an agreement between them. However the problem would be that it might be necessary to amend the Statute of the ICJ, which would influence the reading of the Charter. The Registrar stated that, with regard to law of the sea matters, the Court, which

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is usually competent in such cases, sometimes used the Convention as it constituted customary law until its entry into force.

7. Recalling discussions on the privileges and immunities of the Tribunal, one delegation wanted to know who represented the Court in matters of police in the Netherlands and who would sign the authorization for the police to enter the premises of the Court.

8. The Registrar stated that the relations of the Court with the Government of the Netherlands were regulated by an exchange of letters with annexes that contained principles endorsed by the General Assembly in 1946. Consequently, a great deal of flexibility was applied in daily application. He explained that when an administrative question arose, that usually would fall under the competence of the Registrar. He also added that the Registrar had the financial power to use the budget agreed upon by the General Assembly. Those proceedings were however contained in the internal rules. He said that if an unusual question arose, the Court as a party had to examine it. In that regard, he wished to state that the usual tendency was to resolve the issues on friendly terms.

9. At the tenth session of the Preparatory Commission, a letter was received from the ICJ and was read out to the Commission. It stated that there had been no precedent for a relationship agreement between the ICJ and another judicial body. Such a relationship should be examined on an ad hoc basis.

10. It was agreed that the Commission would not proceed further with the question of elaborating a relationship agreement between the ICJ and the Tribunal since the usefulness of preparing such a document had not been established.

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SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Eighth session
Kingston, 5-30 March 1990

Chairman's summary of discussions

Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea

The Special Commission began its work with the consideration of the institutional structure and initial staffing needs of the International Tribunal for the Law of the Sea on the basis of a working paper prepared by the Secretariat under the title "Administrative Arrangements, Structure and Financial Implications of the International Tribunal for the Law of the Sea" (Doc. LOS/PCN/SCN.4/WP.8).

In this connection, the Special Commission had before it two reference papers. Reference Paper 6 comprises the Instruction to the Registry of the I.C.J. (extract from the ICJ Yearbook 1946-1947), issued in October 1946 as amended in March 1947. Reference Paper 7 is a report on the functioning and practice of the International Court of Justice (extract from the ICJ Yearbook 1987-1988).

Introducing document LOS/PCN/SCN.4/WP.8 the Secretary pointed out that the document was based on the organizational structure of the Tribunal as set out in the Convention on the Law of the Sea. The Secretariat had, as requested by the Special Commission, also taken account of the structure of existing international tribunals and courts, and of their experience, notably that of the International Court of Justice.

In preparing the working paper the Secretariat also took into account that unlike the ICJ the Tribunal would not be an organ of the United Nations but rather an independent judicial body. It would not, therefore, have recourse to support services and facilities such as are available to the International Court of Justice.

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The Secretary pointed out that for the purposes of determining the size and structure of the initial institution it had been assumed that the level of activity in contentious cases would be similar to the current level of activity of the International Court of Justice. In addition, it had been assumed that there would be some applications for provisional measures and the prompt release of vessels and crews submitted each year. The size of the initial institution proposed was based on the need for the Tribunal to be ready to function with all of its chambers, including the Sea-Bed Disputes Chamber, from the time of its formation. Institutional and financial implications would be greater as the case-load of the Tribunal increased.

The Secretary also drew attention to the fact that in the preparation of WP.8 it had been assumed that, as suggested by the Special Commission, the Tribunal would use two working languages, with unofficial translations of the pleadings to be issued later in six official languages of the United Nations and unofficial translations of the judgments, opinions and orders to be issued later in the 4 non-working languages.

General remarks

At the start of the discussion some delegations made comments of a general nature on document WP.8. Delegations had received the working paper at the beginning of the eighth session, and required time to consult with their competent national authorities and were therefore unable to take an official stand. The questions raised in the working paper would have financial implications on the States Parties to the Convention regarding their contribution to the budget of the Tribunal. Delegations could only therefore make provisional comments at this stage.

The Special Commission agreed to continue the discussions on document WP.8 during the summer meeting of the eighth session so that delegations would have another opportunity to state their views.

During the general remarks and subsequent discussions on the individual chapters of the working paper there was agreement on the need for maximum economy in the establishment and the functioning of the Tribunal while maintaining the highest possible level of efficiency.

To this end a number of suggestions were made:

One delegation was of the view that it was no longer necessary or appropriate for the Tribunal to have its full complement of 21 members at the time of its establishment. The size of the Tribunal had been fixed on the assumption that deep sea-bed mining would be likely to commence simultaneously with the establishment of the Tribunal.

Proceeding from the assumption that deep sea-bed mining was not likely to commence until many years after the establishment of the Tribunal and given the

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fact that the build-up in the Tribunal's work other than its judicial functions was likely to be gradual, the same delegation suggested that the size of the Tribunal and its support staffing could possibly be reduced in the early stages of its operations. The Tribunal in its view could initially be reduced in size to seven or fourteen members, which could be achieved without violating the principle that in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be ensured. That delegation also proposed that provision should be made so that the size of the Tribunal could be increased as its work-load grows. That delegation also felt that there should be an opportunity, in the early stages of the Tribunal's operation, to share some of the facilities of the ICJ.

Some delegations supported this proposal.

In this connection attention was also drawn to the possibility that in the first few years after entry into force of the Convention there might not be more than 60 Parties who would have ratified the Convention and that is why it would be unlikely for the Tribunal to be faced with a large case load in its initial stage. The Special Commission requested the Secretariat to prepare a document setting out a scenario for a Tribunal whereby it could begin its work on a reduced scale with a view to gradually increasing its size in parallel with its increasing work load.

Other delegations were against a reduction of the stipulated number of Members of the Tribunal at any stage of the Tribunal's existence. They argued that to do so would be clearly in contravention of the relevant provisions of the Convention. They cited, among other provisions, article 2 of the Tribunal's Statute which stipulates that the Tribunal shall be composed of a body of 21 independent Members.

It was therefore, not permissible, they argued, to divert from this clear-cut provision; nor would the Meeting of States Parties have the competence to alter this provision of the Convention.

It was also pointed out that even in the initial phase the participation of all 21 members of the Tribunal was urgently required for the completion and adoption of the legal documents needed for the Tribunal's functioning. Besides, a reduction in the number of Members would not entail a substantial cut in costs since, irrespective of whether the Tribunal would have 14 or 21 members, the size of the staff required for the maintenance of its functions would essentially be the same.

There was a large measure of agreement to the effect that the costs for the staff of the Tribunal should be further reduced through a highly effective structure and the streamlining of the work of the Registry.

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Another suggestion was that the general contributions of the Parties to the Convention to the budget of the Tribunal should be minimized by providing that those who use the services of the Tribunal, whether States Parties or not, make a special contribution towards its cost, which would be applied in the reduction of the assessed contribution of States Parties.

The application of the "user pays" principle would also be useful in discouraging unnecessary applications to the Tribunal.

With regard to any contribution towards cost required from States Parties generally, it was suggested that the Tribunal should be an operating expense of the Convention, so that, to the extent that the Authority would earn revenue, the cost of the Tribunal would be a charge against that revenue except to the extent that costs would be contributed by users.

This suggestion was opposed by other delegations who pointed out that it ran counter to article 19 of the Tribunal's Statute which provides that the States Parties to the Convention and the Authority contribute to the budget of the Tribunal, on such terms and in such a manner as shall be decided at meetings of the States Parties, while in cases where an entity other than a State Party or the Authority is a party to a case submitted to it, the Tribunal shall fix the amount which that party is to contribute towards the expenses of the Tribunal.

It was argued that the introduction of the principle of "user pays" would discourage the parties to a dispute from submitting it to the Tribunal. That principle would also encourage them to present their case to the ICJ which does not apply such a user principle.

The Special Commission also discussed the question of an appropriate mechanism to control the budget of the Tribunal.

One suggestion was that such control could be exercised by the Finance Committee proposed for the International Sea-Bed Authority on the grounds that both the Assembly of the Authority and the meetings of States Parties (convened under article 19 of the Statute of the Tribunal) would be composed of the States Parties to the Convention. It was argued that the Authority's Finance Committee could very well be entrusted with control over the budget of the Tribunal without curtailing its independence. Another argument in support was that since the Authority would in any case contribute to the budget of the Tribunal, the Finance Committee would have to review the Tribunal's budget as part of its review of the Authority's expenditures.

This idea was supported by a few delegations on the grounds that it would make the establishment of a separate control mechanism superfluous and thus save costs.

Opposing the suggestion some delegations favoured the creation of a separate finance committee. Such a committee, they felt, should be appointed by the Meeting of States Parties.

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Attention was drawn to the fact that in the interest of maintaining the independent status of the Tribunal, the Convention explicitly provides that it is for the meeting of States Parties and not for the Assembly of the Authority, even though both are constituted by the same States, to decide on the terms on which States Parties and the Authority would contribute to the Tribunal's budget and on the manner in which they would do so. Allowance would also have to be made for the fact that there would be no mining activities on the sea-bed in the foreseeable future, which is why the time of commencement of future activities of the Authority and the Enterprise was somewhat uncertain. Consequently, a situation might be imaginable where the Tribunal assumes its functions without a finance committee of the Authority having been established.

Besides, a finance committee of the Tribunal composed of a small number of experts would not impose a heavy financial burden on States Parties.

Other delegations proposed that the Tribunal should follow the practice of other international organizations and that the budget of the Tribunal be submitted to the United Nations for review by and the recommendations of its budgetary bodies such as the Advisory Committee on Administrative and Budgetary Questions. Recourse to such a review mechanism of the United Nations would ensure that the independent status of the Tribunal would be maintained while the establishment of a cost-causing separate finance committee for the Tribunal would be avoided.

There was agreement in the Special Commission on the need for an effective control mechanism for the budget of the Tribunal which should in no way affect its independence while ensuring that it would be as cost-effective as possible. The nature of such a mechanism is to be the subject of further discussions at the summer meetings of the eighth session.

One delegation, in its general remarks on the working paper, pointed out that the paper contained language that might easily be misread as having operative legal content. It was the understanding of that delegation that the working paper dealt exclusively with factual issues, notably with questions of a budgetary and administrative nature, and that the paper itself and the consideration given to it by the Special Commission would in no way prejudice or pre-empt the positions that had been or would be taken on legal and procedural questions in other contexts, such as the Convention itself or, where appropriate, the draft rules of procedure, other rules eventually to be adopted by the Tribunal, the future staff regulations of the Tribunal, or any financial regulations applicable to it. The Special Commission should not attempt to pre-empt or even channel the rule-making power of the Tribunal under article 16 of its Statute. The delegation concerned reserved its position on legal issues until these would be addressed in the appropriate legal context.

Several delegations, in their general remarks, commented on issues dealt with in the various chapters of the working paper. These comments will be reflected in subsequent sections of this summary, which reflect the discussions on the individual chapters.

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After the conclusion of general remarks the Special Commission proceeded to an examination of the working paper chapter by chapter.

Chapter I. Seat

The delegation of the Federal Republic of Germany referred to the assumption made by the Secretariat in the introductory note to the working paper that the offer of the Government of the Federal Republic of Germany to provide the building for the Tribunal would include the provision of basic fittings and interpretation facilities and equipment and that consequently no provision for capital outlay has been made. The requirement for other office equipment has been based on a rental basis. In this context the delegation of the Federal Republic of Germany pointed to the letter, dated 9 February 1987 (LOS/PCN/80) from the Chairman of that delegation to the Special Representative of the Secretary-General for the Law of the Sea which stated that the Federal Republic of Germany is willing to erect the office building for the International Tribunal for the Law of the Sea at its own expense and to make it available in accordance with the international practices that have evolved in connection with the provision of premises for United Nations bodies.

The delegation of the Federal Republic of Germany clarified that the offer of its Government includes the installation of seven interpreters' booths and one technician's booth in each of the two chambers. The offer also includes the equipment and technical accessories required in this connection.

As regards the "basic fittings" mentioned in the working paper, the Secretariat explained that the assumption made for purposes of cost estimates was that the building would include essential fittings to be made available in accordance with the draft Headquarters Agreement.

Some delegations wondered what was to be understood by the reference made in the Federal Republic of Germany's offer of 9 February 1987 to "international practices that have evolved in connection with the provision of premises for United Nations bodies" since there are different practices in this regard.

The delegation of the Federal Republic of Germany in reply stated that when the offer was made its Government had in mind the practice in the headquarters agreements between the Government of Austria and the United Nations and its specialized agencies in Vienna. Rent for the premises would be of a purely symbolic or nominal nature and, thus would not have any financial implications.

One delegation referred to a provision made in paragraph 8 of the working paper to the effect that an agreement between the Tribunal and the Government of the Federal Republic of Germany determining the conditions under which the Tribunal would use the premises requires the approval of the Meeting of States Parties. One delegation, supported by some others held the view that the Tribunal would be an independent international institution with a legal personality of its own, which would include the competence to conclude international agreements. Therefore, these delegations felt, that such an agreement did not require approval by a Meeting of States Parties. Such an approval, they argued, would in the final analysis call into question the independence of the Tribunal and its administration of justice.

Other delegations expressed the view that the agreement could have financial implications or it could, moreover, have a direct bearing on the rights and obligations of States Parties to the Convention in the headquarters district. They therefore felt that, approval of such an agreement by a meeting of States Parties was indispensable. They argued that under article 19 of the Tribunal's Statute the States Parties and the Authority would have to bear the costs of the Tribunal, which is why they would have to have a say when it came to agreements concluded by the Tribunal which in their very nature would have financial implications. They pointed out that, moreover, the conclusion of the agreement in question would be part of the Tribunal's administrative functions, which should be strictly separated from its juridical functions.

It was also argued that the requirement of approval of such an agreement by the Meeting of States Parties was in line with international practice, including that of the ICJ, according to which agreements between the ICJ and other States required the approval of the United Nations General Assembly. This was opposed on the grounds that unlike the ICJ the Tribunal would not be an organ of the United Nations.

One delegation suggested that the second sentence of paragraph 8 should be reworded to read that an agreement should be concluded on behalf of, and subject to the approval of States Parties with the Government of the Federal Republic of Germany determining the conditions under which the Tribunal will use the premises. Another delegation felt that the second sentence should be modified to the effect that the agreement in question should be submitted to the meeting of States Parties.

All participants in the discussion agreed that the independence of the Tribunal and of its administration of justice should not in any way be curtailed. At the same time however a number of delegations pointed out that while the Tribunal was independent from each individual State, it was not outside the community of Member States as a whole, which would create it and could also dissolve it. The approval of the aforementioned agreement, these delegations felt, was a matter of exercising certain rights to which the community of Member States in its entirety was entitled and which did not, therefore, in any way influence the independence of the Tribunal in its administration of justice.

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Chapter II. Administration

Section A: The Presidency and Committees of the Tribunal

Introducing the section the Secretary pointed out that it was largely patterned on the practice of the ICJ (cf. Reference Paper 7). He also explained that it was no more than a proposed framework on the basis of which cost estimates could be made.

Some delegations suggested that the number of committees should be reduced. They felt that only the Budgetary and Administrative Committee and the Staff Appeals Committee should be retained and that the Tribunal should decide for itself which other committees it may wish to establish. One delegation suggested that the functions of the Rules Committee for the uniform and proper application of the staff rules and regulations (para. 10) would overlap and possibly even duplicate the functions of the Staff Appeals Committee (para. 16). It was therefore proposed that one of these committees could be eliminated. This proposal was objected to, on the grounds that the two committees would be exercising different functions and that it was appropriate to have the interpretation of a staff rule in a given case determined by a body independent of the one responsible for its application.

Section B: The Registry

Some delegations were of the view that the term "diplomatic support" used in paragraph 17 did not correspond to the function of the Registrar. It was suggested that the Registrar only exercised the function of maintaining relations with the host country.

Some delegations had reservations on the provision in paragraph 20 whereby the Registrar is to have responsibility, among other things, for the preparation of cases for consideration by the Tribunal and shall assist the Tribunal in drafting the texts of judgments, decisions, orders and advisory opinions. They feared that this might lead to the Registrar's administrative functions being mixed up with the administration of justice, which was exclusively incumbent upon the Members of the Tribunal. The Secretary however pointed out that the same functions are allocated to the Registrar by the ICJ (cf. Reference Paper 6).

With reference to the provision in paragraph 21 that the Registry shall be under the control of the Registrar and that he alone shall be authorized to direct the work of the Registry, some delegations suggested to specify that in this regard the Registrar exercises this function under the authority of the Tribunal.

Attention was drawn to the fact that the Deputy Registrar and the Assistant Registrar are elected under the Rules of the Tribunal. Therefore, paragraph 25

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of document WP.8, according to which the Assistant Registrar is designated, would have to be harmonized with the Rules of the Tribunal.

With reference to paragraph 27 one delegation was of the view that it is desirable for officials of the Registry to be proficient in at least one of the official languages and should, have a working knowledge of the other official languages.

It was suggested to simplify the structure of the Registry by incorporating the Judiciary Support Service referred to in paragraph 41, into the secretaries division referred to in paragraph 20.

However, it was also proposed that Members of the Tribunal should have direct access to legal research assistance without going through the Registrar, as an intermediary, who would be in charge of the Secretaries in the legal division.

To streamline the structure of the Tribunal it was suggested to merge the Budget and Accounts Section (paras. 31, 32) with the Budgetary and Administrative Committee (paras. 11, 12) and the Office Secretarial Services (paras. 35, 36).

Another proposal was to merge the Documents Department (paras. 33, 34) with the Archives and Distribution Service (para. 39). This was objected to on the grounds that these divisions reflected the ICJ practice and functional distinctions between the two services. The Court also maintains a Documents Department apart from an Archives and Distribution Service (cf. Reference Paper 6).

It was assumed that the Linguistic Services provided for in paragraph 40 would be sufficient to ensure the functioning of the Tribunal in two official languages. The Secretary pointed out that they would ensure concordance of translation in the two working languages. Unofficial translation of the pleadings in six languages and judgments to be provided in the other four official languages of the United Nations after completion of each application, case or advisory opinion was to be done by temporary staff. The costs for services provided on a temporary basis as needed had been covered by item 2, annex III of the working paper.

It was further suggested that the working paper should refer to "he or she" when making reference to the posts described therein to allow for the possibility that they might be filled by women.

Chapter III. Financial implications

A number of delegations held the view that the costs of the Tribunal envisaged in the working paper could be substantially reduced, at least for the

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initial establishment of the Tribunal. A possible expansion at a later stage could be based on the actual work-load to be handled by the Tribunal. These economies should apply both to the allowances of the Members of the Tribunal and costs earmarked for the Registry and the support services.

It was also pointed out that the proper functioning of the Tribunal must be assured. Therefore, such cuts must not exceed a reasonable level. Although there was approval, in principle, of the Secretariat's approach in structuring the Tribunal on the lines of the ICJ, it was felt that the set-up of the ICJ should not be adopted at every stage.

With reference to paragraph 43 it was suggested that in estimating the provisional costs, account should be taken of the contribution to the costs of the Tribunal by entities other than States which are parties to a dispute before the Tribunal. The Secretary however pointed to the difficulties involved in assessing or quantifying such contributions in view of the absence of clear guidance in the Convention.

In connection with the expenditures envisaged for the Tribunal, the question of the number of its official languages was also discussed at some length.

A majority of delegations held the view that the Tribunal should have two official languages. In support of that view they pointed out, among other things, that the use of more than two official languages would substantially increase the costs of the Tribunal. It was also argued that the ICJ also uses two official languages. Some delegations felt that a decision in favour of more than two official languages would, moreover, tend to delay proceedings and lead to higher costs for the litigants. In addition, attention was drawn to article 61 of the Tribunal's draft rules which provides that the Tribunal shall, at the request of any party to a dispute, authorize a language other than an official language to be used by that party.

To keep the costs of the Tribunal as low as possible, one delegation suggested that the Tribunal should have only one official language.

Another delegation wondered whether it would not be more appropriate to fix no official language at all and to leave it to the parties to a dispute to decide on the language to be used in the given case. The idea was opposed with the argument that this would considerably complicate the work of the Tribunal because it would require frequent changes of interpreters and translators.

Besides, the documents of the Tribunal should also be available in fixed official languages.

Other delegations had not as yet arrived at a final conclusion concerning the official languages of the Tribunal. They stated that it would be easier for them to make up their minds if the Secretariat could provide estimates of the costs involved in the use of one or six official languages.

A large number of delegations were in agreement that at the end of each case unofficial translations of pleadings and judgments should be published in all six official languages of the Convention.

One delegation was opposed to such translations into all six official languages since this would entail an unjustified increase in the Tribunal's expenditures.

As regards the question of identifying which languages could be the official languages of the Tribunal, only a few delegations stated their views. Those who did indicate their preferences favoured English and French.

As a result of the discussion held so far on the question of the Tribunal's official languages, the Secretariat was requested to provide the cost-implications based on the use of one and of six official languages. The Special Commission agreed to take up the matter of the official languages again when that paper is ready.

Section A. Members of the Tribunal

Several delegations were of the opinion that the annual remuneration of the Members of the Tribunal should be reduced if the Tribunal's work-load was light. In this context mention was made in particular of the fixed annual allowance, which could be substantially, reduced. Only the President of the Tribunal was to draw a substantial annual remuneration because he was the only Member of the Tribunal required to reside at the seat of the Tribunal.

A just solution to the question of how to determine the remuneration of the Members of the Tribunal could possibly lie in payment on a per diem basis as practised for example by the International Law Commission. In determining such remuneration, account should also be taken of the fact that, unlike the judges of the ICJ, the Members of the Tribunal will not be completely interdicted from having, to a certain extent, additional earnings, e.g. from lecturing.

Some delegations opposed any cuts in the emoluments provided for in the working paper on the grounds that they could jeopardize the independence of the Members of the Tribunal, and might conceivably also lead to a reduction in the number of qualified candidates, as specified in article 2 of the Statute, i.e. persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea, who would be prepared to serve on the Tribunal.

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There were no objections in the Special Commission to the provision made in paragraph 51 that ad hoc Members of the Tribunal and experts appointed under article 289 of the Convention should draw a special allowance for each day on which they exercise their functions, in the same amount as envisaged for the Members of the Tribunal.

The Special Commission exchanged views on practical problems relating to the payment of retirement benefits to the Members of the Tribunal (para. 52). Some delegations did not consider it appropriate to establish a separate pension fund in view of the fact that the Tribunal would have only 21 members. Rather, the practice of the ICJ concerning retirement benefits for retired judges of the ICJ was to be followed.

Other delegations held the view that with regard to retirement benefits for the Members of the Tribunal, consideration should be given to other arrangements other than those applicable to the Judges of the ICJ since the former were entitled to be otherwise employed, with independent earnings, while the Judges of the ICJ were not.

The suggestion was made to review the question of retirement benefits for those Members of the Tribunal who on account of their age may already be drawing retirement benefits while serving as Members of the Tribunal.

In reply to a question concerning the meaning of the formulation "travel on other official business" in paragraph 54, the Secretary, explained that this referred to travels by Members of the Tribunal to legal conferences, e.g. for participation in meetings of the Legal Committee during the United Nations General Assembly sessions.

It was suggested that in planning for travel expenses allowance should also be made for the possibility provided for in article 1 (3) of the Statute under which "the Tribunal may sit and exercise its functions elsewhere whenever it considers it desirable".

Section B. Registry

A number of delegations were of the view that the Registry, at least in the initial phase of the Tribunal, did not require highly paid posts at executive level nor did it need so many staff members.

It was noted by the delegation of the Federal Republic of Germany that the working paper was at variance with earlier assessments of staffing and accommodation requirements. For instance, the working paper was envisaging an increase in staff at the director (D-1) level.

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In this connection a number of suggestions were made to the effect that the salary levels of staff of the Registry and the number of high-level posts including that of the Assistant Registrar be reduced. It was argued that the tasks envisioned for the Assistant Registrar could well be assumed by the Deputy Registrar.

Other delegations drew attention to the need for ensuring that the remuneration of officials and other staff members of the Registry should not be below the level of other comparable institutions, so as to make employment with the Registry of the Tribunal attractive to highly qualified specialists.

Another proposal was that the Tribunal, at the time it assumes its functions, should not yet have a full-fledged Registry. Rather, it was to be left entirely to the Tribunal itself to decide on the staff requirements of the Registry. If need be, the assistance of temporary staff members might be enlisted. Others pointed out that temporary staff with qualifications and experience may not be freely available.

Since the present document is a summary of the discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions and these will be taken into account. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being so informed.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL SEABED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Addendum

Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea

(LOS/PCN/SCN.4/WP.8/Add.1 and Corr.1)
(LOS/PCN/SCN.4/WP.8/Add.2 and Corr.1)

A. Supplementary cost estimates reflecting alternatives as to official working languages

(LOS/PCN/SCN.4/WP.8/Add.1)

1. During the summer meetings of the eighth session of the Preparatory Commission, Special Commission 4 began the consideration of the "Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea - Supplementary cost estimates reflecting alternatives as to official working languages" (LOS/PCN/SCN.4/WP.8/Add.1). Although the examination of the working paper was completed at the session, it was generally agreed that some of the issues taken up in the working paper would be considered again in connection with document LOS/PCN/SCN.4/WP.8/Add.2 entitled "A scheme to phase in the establishment of the International Tribunal for the Law of the Sea".

Introduction of the working paper

2. In introducing the working paper, the Secretary pointed out that the document had been requested during the consideration of document LOS/PCN/SCN.4/WP.8, which gives the institutional structure involved with the use by the Tribunal of two working languages. In preparing the document the

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secretariat had taken into account the cases of the International Court of Justice and other tribunals and courts.

3. In LOS/PCN/SCN.4/WP.8/Add.1, the secretariat had elaborated a cost estimate for the case of one working language and for six working languages, maintaining the structure detailed in LOS/PCN/SCN.4/WP.8, except as regards linguistic staff.

4. In so doing, it had not been possible to take into account the discussions in the Special Commission with regard to reducing the staff of the Registry. It therefore became necessary for another document on phasing in the Tribunal to be prepared. 1/

5. The Secretary insisted that although the working paper only gave a graphic overview, it was clear that in increasing linguistic staff, it would also be necessary to increase the administrative support. In this connection he corrected that on page 6, in the summary of recurrent financial implications, the total figure for six languages was $18,913.7 instead of $8,913.7. 2/

General remarks

6. At the start of the discussions, centring on the consideration of the different figures, several delegations pointed out the important modifications resulting from the evaluation of the cost implications of the use by the Tribunal of one, two or six languages.

7. Several delegations were of the view that, based on the comparative figures, the use of two working languages by the Tribunal was the reasonable financial alternative. It would also correspond to the existing international practice.

8. Other delegations, however, wanted a full breakdown of the figures, particularly with regard to the use of six languages by the Tribunal. They felt that the working paper lacked some information.

9. First, the Secretary clarified that the external printing referred to in the footnotes to the final table would not necessarily be done by the United Nations because of the independent status of the Tribunal. The Secretary also stated that the working paper was based on the assumption that there would be unofficial translations of the pleadings and judgments, which would be published. Official translations would require terminologists, editors, etc., and thus would be more costly. That explained the difference in the figures, taking into account that with the use of one or two working languages there would be minimal translation because the Tribunal staff could work in both languages. He insisted that such would not be the case if six languages were used by the Tribunal, because every paper would have to be concurrently translated or, whenever the need arose, would have to be simultaneously translated for the Judges. Finally, he specified that the figures for the use of six working languages did not even reflect requirements of the library and the archives.

10. Some delegations insisted that the use of two working languages, although the practice of the ICJ, for example, was not without its problems. The language issue should be considered with regard to the proper functioning of the Tribunal. Those delegations insisted that the Commission should take a flexible approach on the matter.

11. Some delegations were of the view that although the two-languages system representing the two major legal systems was an acceptable alternative, the Tribunal should be able to accept texts of the major language spoken by parties to a dispute even when it is not one of the six languages of the Tribunal.

12. With regard to the question of which languages should be used, some delegations suggested the use of English and French as being customary while others insisted that Spanish should be one of the languages used.

13. In the end, it was perceived that the question of languages could not be solved in an equitable manner, since its implications were not only financial but also substantial. The general view was thus that the Tribunal should be flexible on the question. Some delegations however reserved their final views on the matter until the consideration of LOS/PCN/SCN.4/WP.8/Add.2, which would give the general budget of a phased-in Tribunal.

B. Scheme to phase in the establishment of the International Tribunal for the Law of the Sea

(LOS/PCN/SCN.4/WP.8/Add.2)

14. During the spring meetings of the ninth session of the Preparatory Commission, Special Commission 4 began the consideration of the "Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea - a scheme to phase in the establishment of the International Tribunal for the Law of the Sea" (LOS/PCN/SCN.4/WP.8/Add.2). The discussions on the paper were concluded at the same session. It was agreed that delegations should first exchange general views on the document and then discuss it part by part.

Introduction of the working paper

15. In introducing the working paper, the Secretary stated that it was based on certain fundamental assumptions as well as the desire to involve minimal costs at the early stages of the Tribunal. He explained that the document took into account the experience of the United Nations and the practice of the ICJ. It was assumed that the Tribunal as provided for in the Convention, with its 21 Judges, had already been agreed upon and that it was to be composed of two chambers and would use two working languages. 3/ He explained that the working paper was based on the fact that the Tribunal would be responsible for its internal functioning and that the Convention did not stipulate that all the Judges would have to be present at headquarters. Consequently, the Secretary stated, three possibilities were pursued in the document: (A) to have two Members available at the seat of the Tribunal and the rest in their home countries (this case would entail implications for application for provisional

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measures); (B) to have five Members present, enough to constitute a chamber; and (C) to have 11 Members present (which would satisfy the quorum requirement).

General remarks

16. As a general statement, several delegations stated their preference for scheme B. One delegation was of the view that since fisheries disputes, for example, might arise it was wise for scheme B to provide for the setting up of at least one chamber that could deal with such disputes. Another delegation, however, stated that although he agreed that the document was a good basis for discussion, he insisted that the Commission should not forget the principles of equitable geographical representation and the representation of the principal legal systems.

Part I. CRITERIA

and

Part II. APPROACH

17. In introducing the two parts, the Secretary stated that the criteria taken into account in formulating the different schemes were contained in Part I. He reminded the delegations that the different schemes took advantage of the fact that, although any variation in the number of elected Members would be in violation of the Convention, the Convention did not stipulate that all 21 of the Judges were to be present at headquarters. He also clarified that by establishing such schemes, it would not be possible to have equitable geographical representation all the time, nor representation of the principal legal systems. However, the Tribunal would still be able to call upon other Members, not at headquarters, in order to fulfil these requirements. He concluded his introduction by stating that in preparing the working paper, the fact had been taken into account that as the workload increased, so also would the number of active Judges. The Commission therefore could consider accepting one or more of the schemes presented in the working paper.

18. Some delegations wanted to know if, under the terms of scheme B, all five Members would have to reside at the seat of the Tribunal. One of the delegations pointed out that the ICJ experience provided that was only necessary for the President and the Registrar to reside at The Hague. Another delegation was of the view that when the Judges were not at the seat and engaging in work related to the Tribunal, they should not be paid.

19. The Secretary explained that the working paper did not require that all five Judges should be present at the seat; they should however be ready to make themselves available on short notice. This would also be reflected in the difference in remuneration. He also clarified that two legal systems were usually represented: the civil and the common legal systems. Nevertheless, he noted that recently other legal systems had been called for, e.g., the Islamic legal system.

20. In the end, one delegation pointed out that, with regard to part II, paragraph 7, of the working paper providing for emergencies and taking into account that in the initial phase the Tribunal would have a full programme of work, he was of the view that it would not be realistic to accept one scheme.

Part III. SCHEME FOR INITIAL ESTABLISHMENT OF THE TRIBUNAL AND REQUISITE REGISTRY

A. Elections

21. Some delegations were of the view that equitable geographical representation and representation of the principal legal systems should be respected whatever the scheme. One delegation wanted to know if this would be feasible when drawing lots, as provided for in article 5, paragraph 2, of the Statute of the Tribunal. In connection with that question, he wanted to know about the experience of the International Law Commission.

22. One delegation suggested that with regard to the representation of geographical regions and legal systems, there should be a quorum instituted, whatever the scheme chosen.

B. Availability of Members

23. One delegation wanted to know what was the freedom implied in paragraph 16 with regard to what a Member would be allowed to do when he was not working for the Tribunal.

24. The Secretary referred him to article 7 of the Statute of the Tribunal dealing with incompatible activities.

25. With regard to the availability of Members, some delegations pronounced themselves in favour of a gradual process in the establishment of the Tribunal that would allow for the three different schemes. It was argued that this would allow more flexibility and that a small number of resident Judges would then not be able to monopolize all the work but would rather give the opportunity to a greater number of Judges to be involved, up to the quorum required in the Statute, i.e., 11 Judges.

26. Other delegations, however, rejected both scheme A and scheme B, the latter on the grounds that it would not be useful to have five Judges if no party to a dispute chose any of them.

27. One delegation wanted to know who would finance the residence of the President. It was replied that this should be for the Commission to decide since in its letter dated 9 February 1987, Germany stated that it was willing to erect the office building and no mention had been made of the residence of the President. In this connection, one delegation drew attention to the fact that the working paper seemed to assume that the Vice-President would also reside at the seat of the Tribunal.

28. A question was also raised about how it would be decided which Judges would be active and which inactive. The Secretary responded that this would be up to the Tribunal to determine in deciding its internal functioning.

C. Remuneration of Members

29. In his introduction to this section, the Secretary stated that the salary of the residing Judges would be $100,000 per year. For those in waiting, a different scheme of remuneration had been planned, taking into account the cost-of-living allowance. In this connection, he specified that the practice of the United Nations served as model. He also called the attention of the Commission to the fact that the General Assembly had recently increased by 50 per cent the annual salary of the Judges of the ICJ. He also pointed out that the different schemes proposed would affect the number of staff of the Registry.

30. It was observed that discussions on the matter of remuneration had been held and were reflected in document LOS/PCN/SCN.4/L.14.

31. It was also clarified that assumptions in this section were made on the basis that in accordance with the different schemes, 2 and then 5 and then 11 Judges would be present at the seat of the Tribunal.

32. With regard to paragraphs 25 and 26 of WP.8/Add.2 and paragraphs 50 and 51 of WP.8, some delegations requested clarifications on the different remuneration accorded the ad hoc Members and experts in the two working papers. Clarification of the term "subsistence allowance" was also sought.

33. The Secretary explained that in the original paper, WP.8, the remuneration of the Judges was viewed in terms of two components: the annual allowance and the special allowance. In WP.8/Add.2 it had been made certain that the annual allowance would not be higher than $25,000.

34. A special allowance equivalent to a per diem had been calculated based on the comparator for Hamburg, which is The Hague. A serving Member would receive the full allowance. It had been taken into account that the ICJ made additional payments not provided for in its Statute; hence the subsistence allowance. In WP.8/Add.2, the different schemes had been elaborated in order to minimize the costs. If only a Member and not an active Member is elected, he would receive the annual allowance. However, if he worked 250 days (maximum number of days for accounting purposes), he would also get the per diem or subsistence allowance for those days. With regard to the ad hoc members or experts, they would receive a subsistence allowance. For this category, the Secretary explained that their remuneration was already a built-in cost in WP.8/Add.2. He insisted that the subsistence allowance was by nature temporary.

35. One delegation wanted to know if the President and Vice-President would be required to reside at the headquarters and their status with regard to remuneration.

36. He was referred to article 18, paragraphs 2 and 3, of the Statute requiring respectively that the President receive a special annual allowance and that the Vice-President receive one for the day he acts as President.

37. When asked whether the general philosophy behind the working paper and the institution of the subsistence allowance was attractive enough to draw high-quality Judges, the Commission expressed a large measure of general agreement on the working paper.

D. Structure and staff of the Registry

38. The Secretary stated that this section reflected, with adjustments, the experience of the ICJ. He pointed out in particular that the ICJ tended to employ multivalent staff and that this idea was outlined in paragraph 28 of WP.8/Add.2. Under it, a professional Secretary might also serve as a translator during the sessions of the Court. He also specified that although that idea was used for the General Service category, and made reference to the organizational charts of schemes A, B and C of annex I, the boxes used for convenience might not be necessary. He added that the staffing levels were consistent with the practice of the ICJ and he reminded delegations that the document had been prepared on the basis of the use of two working languages.

39. One delegation wanted to know if the salary level for the staff of the Registry was similar to that of the ICJ.

40. The Secretary replied that although it might fluctuate marginally on the basis of the location of the duty station, the level of remuneration was the same.

41. Another delegation was concerned over the fact that a limited amount of staff would be burdened with a heavy workload, if the approach outlined in paragraph 28 concerning multivalent staffing was carried out. For the initial functioning of the Tribunal, he suggested that a flexible approach be adopted that would allow recruitment of the necessary human resources.

42. Another delegation was of the view however that since it was not really possible to draw up at such an early stage a scheme that would give a maximum output, it would be preferable for the time being to retain the working paper as currently drafted by the secretariat.

43. One delegation expressed concern over whether, if at the initial phase of the Tribunal there were only two working languages, i.e., English and French, there would also be provision for some staff to work in other foreign languages. The Secretary replied that the assumption was that there would be two working languages but it had not been determined which they would be. He added that, when necessary, translation into other languages would be made available from outside sources.

44. Another delegation asked about the utilization of temporary staff, as was done by the ICJ, but which was not reflected in the working paper. The

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Secretary pointed out this matter had been taken into account and was provided for in annex III under the heading "General temporary assistance".

45. With regard to the issue of the principle of equitable geographical representation as enunciated in Article 101, paragraph 3 of the Charter of the United Nations, the Secretary stated that attention had not been paid to that Article when formulating the different schemes. However, that consideration could be taken into account when drafting the staff regulations and rules.

46. In the end, there was a general agreement on section D and part IV of the document.

47. Delegations were then invited to continue the discussions on the language issue on the basis of both WP.8/Add.1 and Add.2.

48. It was recalled that several delegations had stated their preference for two working languages. They had felt that the pleadings could then be translated into the other four languages. Some delegations had even specifically identified the two official languages to be used.

49. One delegation referred to the United Nations Decade of International Law and, with a view to improving the dissemination of international law, particularly among the third world, suggested that the Tribunal use six languages. He was therefore of the view that the Commission should make the necessary arrangements towards such an end. His suggestion was supported by other delegations.

50. However, several other delegations rejected that suggestion in view of the necessity to ensure that the Tribunal was cost-effective and efficient. Those had been the main objectives that the Commission seemed to have agreed upon.

51. It was suggested that the Commission should follow the experience of the ICJ on the matter, i.e., two working languages, English and French, along with informal translations into other languages. These translations could always be checked by the Tribunal or by the Parties to the dispute.

52. In that connection another delegation argued that the use of one official language would thus be even more cost-effective, and that language should be Spanish.

53. Several language combinations were suggested. One of the concerns also expressed was related to the official or unofficial character of the translations, pleadings and judgments.

54. In the matter of languages, then, no conclusive solution was arrived at as to how many and which ones would be used by the Tribunal.

55. There was a general feeling that, in the absence of such a conclusive compromise, the assumption would remain that the Tribunal would have two working languages.

56. The Commission then decided to discuss another controversial issue, namely the number of Members to be present at the seat of the Tribunal, taking into consideration the different schemes and issues involved.

57. One of the issues to be taken into account by the Commission was the question of the prompt release of vessels, which necessitated a decision by the Tribunal. This issue was raised by one representative, who argued that neither two Judges (as in scheme A) nor the special chambers could deal with the question since, according to article 292, paragraph 3, of the Convention, "the Court or Tribunal shall deal without delay with the application for release ...". He stressed the urgent character of such decisions as those involving the prompt release of vessels. He therefore suggested that, although it would be costly, the Tribunal should have available from the inception of its functioning the full quorum of 11 Members.

58. However, it was also argued that although the principles of equitable geographical representation and representation of the principal legal systems were important as they were mentioned in the Convention (article 2, paragraph 2, and article 3, paragraph 2, of the Statute of the Tribunal (annex VI)), the Commission should not ignore the necessity of attaining a cost-effective Tribunal which underlay the working paper under discussion.

59. Some delegations were thus in favour of a progressive implementation of scheme B and then scheme C. Scheme A was considered as the extreme alternative in view of the necessity to respect the above-mentioned principles. Therefore the Tribunal would first have five Members immediately available and then, as the necessity arose, would call upon six others to constitute the quorum of 11 Members.

60. Other delegations insisted that the quorum required for the Tribunal was established in the Convention at 11 Members and therefore the Commission could not provide for any less than that number. This was underscored by the necessity to maintain at all times, even with the rotation system, the principles of equitable geographic representation and representation of the principal legal systems.

61. The Secretary drew the attention of the Commission to article 16 of the Statute, which established that the Tribunal shall be responsible for its own procedure. This remark was related to the above reference to the rotation system. It was fitting for the Tribunal to respect the two principles at its own level during rotation, but also when dealing with the composition of the different chambers.

ANNEXES II AND III 4/

62. The Commission then began its discussions on annex II giving the staffing structure for three schemes (A, B, C) for the phased-in Tribunal. The Secretary introduced some corrections to WP.8/Add.2 and explained that the schemes had been based to a great extent on the ICJ, and had taken into account, in dealing with administrative activities, that the Tribunal was a judicial body. He

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pointed out that it was not possible to identify every aspect or detail, hence the variations between the different schemes.

63. Some delegations were of the view that when a greater number of Members were present at the seat, this did not mean that additional administrative support would be needed. It was argued that, on the contrary, the size of the Registry staff should depend upon the caseload, as was the practice with the ICJ. One delegation pointed out that the administrative structure of the Authority seemed to be leaner than that of the Tribunal.

64. Another delegation however warned against sacrificing the efficiency of the Tribunal for a marginal cost saving. He also requested clarification as to the difference in cost of the Tribunal as outlined in WP.8/Add.2 and in LOS/PCN/WP.51, the Chairman's report.

65. The Secretary explained that the former document had sought to combine efficiency, viability and cost-effectiveness for the Tribunal. He pointed out that scheme C provided for more support services because of the amount of research work that would need to be done for the Judges. He also pointed out that the document took into account the fact that most of the ICJ cases concerned law of the sea matters. He added that the difference between LOS/PCN/WP.51 and LOS/PCN/SCN.4/WP.8/Add.2 was attributable to the fact that the Office of Programme Planning, Budget and Finance of the United Nations Secretariat had advised that the staff costs were inadequate. Scheme B in WP.8/Add.2, drafted subsequently, was the closest to realistic estimates.

66. Concerning annex III, the Secretary pointed out that the variations in the schemes with regard to the expenditures for temporary assistance were related to the fact that the Registry of ICJ had warned that it was difficult to recruit qualified short-term staff. Also, a minimal structure would need to be supplemented by temporary staff for the workload increase. Otherwise, he explained that the same caseload had been assumed for schemes A, B and C (para. 27 of the main document). He added that since the costs of printing at headquarters (i.e., Hamburg) were not known, the figure from the nearest duty station, The Hague, had been used.

67. One delegation asked about the difference between schemes A and C with regard to the cost for official travel.

68. The Secretary explained that under scheme A more travel would be required to constitute the chambers, while under scheme C, a sufficient amount of Members would already be available at the seat, and hence less travel would be required.

69. Other delegations wanted to know why common staff costs grew from scheme to scheme and while the representation allowances remained constant over the three schemes.

70. The Secretary stated that common staff costs represented a supplement to the established posts and reflected allowances to be paid to the staff, such as education grant, installation grant, home leave, etc. He also explained that the representation allowance was only paid to the Registrar, hence the constant figure.

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71. The Commission thus completed its consideration of document LOS/PCN/SCN.4/WP.8/Add.2.

72. The Chairman would appreciate being apprised of any matter of consequence not reflected in the present summary.

Notes

1/ See document LOS/PCN/SCN.4/WP.8/Add.2 entitled "A scheme to phase in the establishment of the International Tribunal for the Law of the Sea".

2/ See LOS/PCN/SCN.4/WP.8/Add.1/Corr.1.

3/ Alternatives to using two working languages were provided in document LOS/PCN/SCN.4/WP.8/Add.1.

4/ Annex I contains organizational charts for schemes A, B and C.

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Chairman's summary of discussions

Relationship arrangements between the United Nations and the International Tribunal for the Law of the Sea

Draft Agreement on Co-operation and Relationships between the United Nations and the International Tribunal for the Law of the Sea

1. During the spring meetings of the Eighth Session of the Preparatory Commission, Special Commission 4 began the consideration of the relationship arrangements to be concluded between the United Nations and the International Tribunal for the Law of the Sea on the basis of a working paper prepared by the Secretariat entitled "Draft Agreement on Co-operation and Relationship between the United Nations and the International Tribunal for the Law of the Sea" (document LOS/PCN/SCN.4/WP.9). The discussion on this working paper continued during the summer session. It was agreed that in discussing this working paper, general remarks should be made first, followed by an article by article examination of the document. It was decided that the Preamble would be discussed after completing the consideration of the substantive provisions. The first seven articles were examined during the spring session in Kingston, the remaining articles and the preamble were discussed during the summer session in New York.

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Introduction of the working paper

2. Introducing the working paper, the Secretary stated that the document was drafted in the form of articles in response to the request from the Special Commission. He also stated that the usual provisions as drafted were patterned on agreements recently approved by the General Assembly. He pointed out that during the discussions of document LOS/PCN/SCN.4/WP.8, it became apparent that some of the costs could be borne by common service provided by the United Nations, if proper relationship agreement were concluded.

General remarks

3. One delegation was of the view that this sort of agreement, which an organization enters into after gaining certain experiences, should not be drafted in such a detail manner even before the Tribunal was created. The question as to whether such an agreement could be entered into should be left to the legislative body of the Tribunal. The agreement, in the form presented, prejudges the reaction of Member States. That delegation considered, therefore, that submitting such a draft agreement would stretch paragraph 10 of Resolution I to the limit and would burden the meeting of the States Parties. The delegation further suggested that the Special Commission should not unduly influence the decision of the legislative body especially on staff and financial matters, since the future situation is unknown.

4. Another delegation stated that during the first meeting of the Special Commission, a list of the relationship agreements to be prepared as part of the work of this Special Commission was drawn up and nobody objected to the list at that time. Several delegations supported this statement adding that drafts now being discussed are only of a recommendatory nature and will eventually be submitted to the Meeting of the States Parties for consideration.

5. The attention of the Special Commission was also drawn by one delegation to the fact that in concluding agreements with other international organizations, the independence of the Tribunal should be safeguarded.

Article 1 - Principles and mutual recognition

6. In introducing article 1, the Secretary mentioned that the article merely deals with the mutual recognition of the two organizations in question, their competences and responsibilities.

7. Several delegations suggested that the title of the article be changed. Since the substance of the article refers to mutual recognition, one delegation considered that the use of the word "principle" was not justified. What was important was the recognition of mandate and the legal relationship between the United Nations and the Tribunal.

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Some delegations considered that the reference to the intergovernmental character of the Tribunal was not appropriate. They agreed that the term was not associated with judicial bodies. It was proposed to use the term "International Judicial body".

9. The question of the mutual recognition between the United Nations and the Tribunal was also discussed. Several delegations stated that mutual recognition was not necessary, since the Tribunal is created by the Convention. One delegation pointed out that the draft would give the impression that there is already a tacit mutual recognition. Another view expressed was that the mutual recognition principle should be reflected in the Preamble and that article 1 should only deal with the objective of the agreement.

10. Several proposals were made in order to redraft article 1. Some delegations were of the view that paragraphs 1 and 3 could be merged since they both deal with the same question. A new draft for paragraph 1 was suggested as follows: "The United Nations recognizes the International Tribunal and its actions under the Convention and its Statute. The United Nations and the International Tribunal shall establish a relationship by this agreement." Another delegation however suggested the following draft: "The International Tribunal is an independent judicial institution with which the United Nations establishes working relations on the basis of this agreement and in conformity with the Convention and its Statute". Both proposals suggested the deletion of paragraph 3. Another redraft for article 1 proposed that the first part of paragraph 3 up to the word "therein" would be deleted and the rest of the paragraph would remain as drafted by the Secretariat. The two first proposals were supported by several delegations.

Article 2 - Recommendations and resolutions of the United Nations

11. In his introduction, the Secretary pointed out that the provisions of article 2 were to enable the Tribunal to be aware of resolutions of the United Nations as quickly as possible. In the event that the Tribunal decides that action could be taken on any of the resolutions, it would then inform the General Assembly on the action taken on such a United Nations recommendation or resolution. The Secretary further stated that the provisions in article 2 were purely for administrative or budgetary matters.

12. Several delegations proposed the deletion of article 2. They argued that compliance with article 2 would place extra financial burden on the Tribunal. It was suggested that the provision under this article could be covered by the provisions in article 7. Another delegation however was of the view that only recommendations and resolutions relevant to the work of the Tribunal should be considered under this article.

13. At the end, it was agreed that article 2 should be deleted.

Article 3 - Co-operation and co-ordination

14. In introducing article 3, the Secretary pointed out that certain non-judicial activities of the Tribunal which are also being undertaken by other international bodies like the dissemination and teaching of international law, should be co-ordinated in order to avoid over-lapping.

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15. Several delegations expressed their concern about the wording of article 3. They felt that the Tribunal could incur high travelling costs if it were to implement article 3. They further felt that not many matters could be subject to such co-ordination.

Paragraph 1

16. Many delegations suggested that paragraph 1 would need further clarification. One delegation was of the view that the provisions of paragraph 1 was necessary. Another delegation felt however that apart from the judicial and administrative functions of the Tribunal there were no other activities to co-ordinate.

17. One delegation proposed the deletion in paragraph 1 of the last words "and will consult ... interest" because of its financial implications. The idea of minimizing costs by modifying this article was supported by other delegations.

18. One delegation remarked that because paragraph 1 contains two elements: a) consultations and b) co-operation, it suggested the deletion in the first and fifth lines of paragraph 1, the words "for the Law of the Sea". This delegation further suggested the following text for paragraph 1: "The United Nations and the International Tribunal ... will consult each other when the need arises."

19. Another suggestion was to include the words "other than judicial matters" after the words "matters of common interest" in the last line of paragraph 1.

Paragraph 2

20. A few delegations were of the view that paragraph 2 was not needed and should therefore be deleted. Others however felt that the paragraph should be retained with some amendment in order to make it clearer. Among those delegations supporting the retention of paragraph 2, one delegation suggested the deletion of the reference to specialized agencies and to include the reference to the ICJ instead.

21. In order to make the text of Article 3 clearer the following proposal was made by one delegation: "The United Nations and the International Tribunal of the Law of the Sea with a view to the attainment of their objectives agree (in particular): a) to undertake consultations and to co-operate when appropriate on matters of mutual concern, b) to pursue initiatives to reduce to a minimum overlapping areas of responsibilities and the consequent avoidance of duplication of activities as far as possible between the United Nations and its specialized agencies and the International Tribunal of the Law of the Sea"

Article 4 - Relations with the International Court of Justice

22. In the introduction of this article the Secretary stated that in the Rules of Procedure of the Tribunal provisions were made whereby the Tribunal could ask for information from international organizations. The two international courts (the Tribunal and the ICJ) could actually request from each other such information. In this connection the Secretary mentioned the

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issue of the prompt release of vessels and crews as one example. The situation might arise when an application could be submitted either to the ICJ or the Tribunal. If this was the case, a mechanism should be established to ensure that there is communication between the two courts so that each one would carry out its functions properly.

23. Concerning this article the question was posed as to whether this agreement would also be binding to the International Court of Justice, since article 287, paragraph 1 of the Convention also designates the ICJ as an organ for the settlement of disputes. One delegation suggested that a separate relastionship agreement between the ICJ and the Tribunal should be concluded in order to recognize the fact that the two courts have the same jurisdiction.

24. Another suggestion was that the ICJ should be expressly mentioned in paragraph 2, since article 287 of the Convention specifically refers to the ICJ and not to the United Nations as a whole.

25. It was further proposed by another delegation to merge article 4 with article 7 since both articles deal with the exchange of information.

26. Regarding the establishment of a relationship agreement with the ICJ, the Secretary pointed out that nothwithstanding the fact that the ICJ is an independent body of the United Nations, it usually does not enter into relationship agreements with other international organizations on its own. An agreement with the United Nations also covers agreement with the ICJ. He stated however that paragraph 2 of article 288 makes a special arrangement necessary since a request for prompt release of vessels could be presented either to the ICJ or the Tribunal. The two courts should exchange information in this regard so that they would not work at cross purposes. The Secretary also stated that articles 4 and 7 deal with specific cases and he would not consider it advisable therefore to merge them.

Article 5 - Assistance to the Security Council

27. In introducing article 5 the Secretary recalled the provisions of article 298, para. 1 (c) of the Convention which states that cases that are already on the agenda of the Security Council should be exempted from compulsory jurisdiction. However, the Security Council may require assistance when deliberating on such matters.

28. One delegation felt that it was not possible for a judicial body to render assistance to the Security Council. On the contrary, what was necessary would be the assistance that the Tribunal can request from the Security Council. The delegation further stressed that the independence of the Tribunal as a judicial body was very important and it therefore proposed the deletion of paragraph 1. Several delegations supported this statement. It was then agreed to delete paragraph 1.

29. Concerning paragraph 2, it was argued by some delegations that the draft goes too far. They argued that since the paragraph is based on article 298 para 1 (c) of the convention, its inclusion in the draft was therefore not necessary. One delegation proposed the adoption of a practical and simple arrangement whereby, in order to ensure compliance with article 298, the procedure adopted in the General Assembly concerning article 12 of the Charter could be followed.

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30. The Special Commission requested the Secretariat to take into account the proposals made by some delegations when redrafting paragraph 2.

Article 6 - Reciprocal representation

31. Introducing article 6, the Secretary recalled that during an earlier discussion of this matter in the Special Commission it had decided that the United Nations should be represented at meetings of the Tribunal when such a meeting was of common interest to both organizations, and when the meeting is not dealing with judicial functions. Paragraph 2 of the proposed articles foresees the reverse situation. The Secretary asked the delegates to delete the word "chambers" and substitute it for the word "committees" in line 3. The Special Commission proceeded with a paragraph by paragraph discussion of the article.

Paragraph 1

32. Delegations questioned the right of the Secretary-General to sit with the Members of the Tribunal even if the discussion relates to matters of common interest to both the United Nations and the Tribunal. They argued that such a provision would suggest that not only the Secretary-General would be entitled to attend and participate in meetings of the Tribunal, but that Members of the United Nations could also claim this entitlement. Other delegations however did not share this view.

33. Concerning the second sentence of paragraph 1 some delegations suggested that the Secretary General should be allowed to participate in such meetings.

Paragraph 2

34. Concerning paragraph 2, one delegation suggested that the President of the Tribunal be entitled to attend meetings of the Security Council. Another delegation however pointed out that such participation could only be done in accordance with the rules of procedure of the Security Council.

35. One delegation questioned the use of the word "entitlement". In its opinion the Secretary-General should be invited and not be entitled to attend such meetings. It argued that the President of the Tribunal cannot be invited by the Secretary-General. Such a decision is to be made only by the Members of the United Nations and by the President of the Security Council.

Paragraph 3

36. One delegation proposed the deletion of paragraph 3 because in its opinion the provision was already covered in article 7. Although this proposal was supported by some delegations others felt that the paragraph should be retained.

37. In response to some questions posed by delegations the Secretary stated that the participation of the President of the Tribunal would be necessary when the item "Law of the Sea" is being discussed in the General Assembly or when the Sixth Committee is dealing with an issue which would be of interest to the Tribunal. It was necessary, in his opinion, to specify the basis upon which the President can participate in the work of the General Assembly, either by right or by invitation. In this connection, he also mentioned that the Secretary-General would attend meetings of the Tribunal only when an issue of common interest to both organizations is being discussed at those meetings. The provision found in this paragraph was for practical purposes. /...

38. Several proposals were made in order to clarify the article as a whole.

39. It was also suggested that reciprocal representation should be provided somehow, without it necessarily being made explicit in the text. It was further suggested that inter-secretarial participation between the secretariat of the United Nations and the Registry of the Tribunal in each others meetings should also be provided for.

40. One proposal made by a delegation with the view of making the text clearer was as follows: "The Secretary-General of the United Nations or his or her representative shall be entitled to attend and participate as appropriate without a vote in meetings of the members of the International Tribunal and of its committees on matters of common interest other than those related to the judicial functions of the International Tribunal. The President of the International Tribunal or his or her representative shall be entitled to attend plenary meetings of the bodies of the UN as appropriate, for purposes of consultation".

41. Another suggestion was to make the participation of the President of the Tribunal in the work of the General Assembly conditional in paragraph 2.

Article 7: Exchange of information and documents

Paragraphs 1 and 2

42. In introducing the paragraphs the Secretary stated that paragraph 1 is to insure a regular exchange of information between the United Nations and the Tribunal. Paragraph 2 on the other hand deals with confidential information and their is a safe-guard measure in order to allow some of discretion.

43. Suggestions were made by delegations that the information to be exchanged should be regular and current. The secretariat stated that there would be no difficulty in redrafting the article to include such provisions.

44. Some delegations felt that paragraph 1 could impose financial burden on the Tribunal. It was suggested that the Tribunal should not prepare special studies for the United Nations, but that since the United Nations has a great deal of resources they could transmit such information that could be of use to the Tribunal.

45. The Secretary also stated that there could be included in the draft a provision of reimbursement where expenses were involved in preparing such studies by the Tribunal so that the United Nations will not be precluded from benefiting from these studies.

Paragraphs 3 and 4

46. In introducing paragraph 3, the Secretary stated that the Convention entrusted the United Nations with different mandates, such as depositary functions, the establishment of the Commission on the Continental Shelf, etc. Likewise, the General Assembly is to request the Secretariat to prepare certain reports on developments relating to the Convention. Paragraphs 3 and 4 are intended to cover these special situations and responsabilities which are derived from the Convention.

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47. Some delegations considered that paragraphs 3 and 4 were not needed since they were just further elaboration of the provisions in paragraphs 1 and 2. One delegation pointed that if paragraph 3(b) is left as currently drafted, the Tribunal might be compelled to transmit pleadings and oral proceedings to the United Nations whilst the case was still going on.

Article 8 - Reports to the United Nations

48. In introducing article 8 the Secretary stated that where a relationship agreement is concluded between two organizations, these organizations are required to report such an arrangement to their constitutive bodies for approval. In the case of the Tribunal, a qualifying clause has been added in the chapeau of article 8. The provision he added, is therefore permissive and there are no restrictive measures whatsoever.

49. Some delegations proposed the deletion of subparagraphs (b) and (c) arguing that it might be an onerous burden on the Tribunal. It was also proposed to delete the reference to the Legal Committee of the General Assembly made in subparagraph (c).

50. The secretariat agreed that there may not be a need for subparagraph (c). Regarding subparagraph (b), the Secretariat proposed further consideration of its provisions taking into account the fact that the Tribunal might need to appraise the Security Council in the light of article 298 paragraph (c) of the Convention.

Article 9 - Personnel arrangements

51. In introducing paragraph 1 of article 9 the Secretary of the Commission explained that the paragraph is for the purpose of uniformity within the international civil service. He further stated that an outline of the way the United Nations civil service system works had already been given in document LOS/PCN/SCN.4/WP.9 Add. 1. Subparagraphs (b) and (c) of document LOS/PCN/SCN.4/WP.9 deals with the exchange of personnel, whereas subparagraph (d) deals with the machinery for the settlement of disputes, the Secretary further stated. He reinterated that this article does not affect the autonomy of the Tribunal in any way whatsoever; its objective was to lay down certain standards and to seek uniformity with the existing international organizations.

52. One delegation was of the view that the participation in the International Civil Service Commission, as envisaged in paragraph 2 (a), was a matter to be decided by the Tribunal. That delegation would prefer that the Tribunal would co-operate in the work of the international civil service commission but not to participate.

53. One delegation felt that paragraph 2(b) would restrict the mandate of the ICSC regarding co-operation between the United Nations and the Tribunal on personnel arrangements.

54. Questions were also raised as to the kind of machinery for the settlement of disputes envisaged in paragraph 2(d). The Secretary explained that what the secretariat had in mind when drafting this paragraph was the staff appeals committee. The Tribunal would however still have to make a decision on this matter.

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Article 10 - Agenda item

55. In introducing this article the Secretary requested the delegations to address the question as to whether the Tribunal could have a right to propose an item for the agenda of the General Assembly for the agenda of the Security Council.

56. Some of the delegations proposed the deletion of article 10. It was also suggested by those delegations that article 10 could be merged with article 8 since they are correlated.

Article 11 - Statistical services

57. The Secretary explained whilst introducing article 11, that in order to have a uniform and centrally mantained statistics and in order to avoid the Tribunal having its own statistical services, it could enter into an agreement with the United Nations for these purposes.

58. Several delegations wondered about the kind of statistical services the Tribunal might require or should mantain. It was explained by the Secretary that this could be on fisheries, environment or other kind of information used by specialized organizations and which could be of interest to the Tribunal, depending on the particular case.

59. One delegation was of the view that articles 11 and 7 could be merged, taking due note of the confidential data that may be available to the Tribunal. This suggestion was supported by some delegations.

Article 12: Relations with other agencies within the United Nations system.

60. In introducing this article, the Secretary stated that the article merely deals with the usual inter-agency co-ordination. This did not mean however that the Tribunal will loose its independency, rather it would be of interest to the Tribunal to have some inputs into the United Nations system.

61. Several delegates agreed that this article as drafted would prejudice the independence of the Tribunal. They argued that the provisions of this article were already contained in articles 7 and 8 (c). They suggested therefore, that the article be deleted.

62. One delegation was of the view that the Social and Economic Council should be referred to in article 8(c). Other delegations however proposed the deletion of article 8, pointing out that article 7 may be sufficient with some amendments.

63. The Secretary stated that article 12 reflected the practice in other agreements between the United Nations and other agencies. He explained that the provisions of article 7 deal with the exchange of neutral information such as reports and some special reports upon request from one organization to the other. Article 8 on the other hand deals with reports to the Legal Committee, the Security Council and other organs of the General Assembly, article 12 deals only with selected activities. The Secretary felt, therefore, that there would be no problem in merging the three articles, provided an adjustment could be made in the terms used, if that was the decision of the commission.

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64. The Special Commission decided that the secretariat should draft one article dealing with the question of exchange of information. In drafting the article the Secretariat was requested to clearly point out the independent status of the Tribunal.

Article 13: Administrative co-operation

65. In introducing the article, the Secretary pointed out the necessity to have co-operation between the administrative machinery of the United Nations and that of the Tribunal so that the latter would not be burdened by heavy administrative machinery. In this regard, it was suggested that the Tribunal be able to use outside services including those made available by the United Nations.

66. Several delegations proposed to simplify the article by merging some of its paragraphs or incorporating them into previous articles dealing with the same matters. In this respect, one delegation suggested that some of the paragraphs of article 13 could be incorporated into article 9, paragraph 2 (c); other articles were 3, 7 and 11 suggested by delegations.

67. Some other delegations expressed their concern as to the hidden meaning behind the word "services", stressing that the matter would be dealt with differently if those "services" implied loan of personnel or data bank.

Article 14: Laissez-passer

68. In its introduction, the Secretary stated that this article concerned the usage of the United Nations Laisser-passer by the officials of the Tribunal. The Secretariat took into consideration the discussions on privileges and immunities held in relation with the Headquarter's agreement when drafting this article .

69. Some delegations pointed out that this article again raised the problem of the independence of the Tribunal. Clarifications were sought as to the implication of the phrase "special arrangements". Those delegations also questioned the ability of the General Assembly, without imposing new requirements or expenses on its member States, to actually extend all the rights and obligations attached to the Laissez-passer to the Members and Officials of the Tribunal.

70. The Secretary explained that should the Tribunal decide to use the Laisser-passer of the United Nations some practical arrangements would have to be made between the United Nations and the Tribunal.

71. Some other delegations were of the view that the Laisser-passer of the United Nations should be used by the Tribunal and that the article as formulated should be retained.

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Article 15: Budgetary and financial arrangements

72. In the introduction of article 15, the Secretary recalled some views expressed in the Special Commission when discussing a related issue. Some delegations had felt then that the budget of the Tribunal should not be reviewed by any other institution, while others felt that the meeting of States parties should review the budget. Article 15, he stated, therefore, tries to give a methodology of the reviewing process of the budget of the Tribunal.

Paragraph 1-3

73. One delegation expressed a general view regarding article 15. It felt that the article as drafted would make the Tribunal into a specialized agency of the United Nations. Another delegation found that the first three paragraphs were distinctly different from the rest of the article since those paragraphs deal with a close budgetary relationship betweeen the United Nations and the Tribunal.

Paragraph 4

74. Some delegations were of the view that the paragraph was based on a promise that the budget of the International Tribunal of the Law for the Sea, would be independent from the budget of the United Nations. Sub-paragraph (b), (c), (d) and (e), therefore did not respect that independence by providing that the budgetary of the Tribunal should go through the various budget bodies of the United Nations.

75. Some delegations proposed that sub-paragraph (b) should be clearly drafted showing that the budget was a draft. The deletion of the phrase "upon its own initiative" in sub-paragraph (e) was proposed.

76. Other delegations stated that although they recognized that the co-operation between the Tribunal and the United Nations was necessary, the budget was a delicate matter and should not be examined by States which were not Party to the Convention. The suggestion was therefore made to completely redraft article 15 so as to make the autonomy of the Tribunal clear. The new redraft would have to take into account the misgiving expressed by some delegations that the General Assembly was the appropriate organ to review the Tribunal's budget.

77. The chairman drew attention to the fact that until the financial paper of the Tribunal was discussed, the sources of financing of the Tribunal known and the mode of collection of contributions stated, it would be better to postpone discussions on article 15. Nevertheless, delegations should keep in mind that it might be practical to use the technical assistance of the General Assembly in the light of its long experience.

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Article 16: Financing of special services

78. In introducing the article, the Secretary pointed out that some services to the Tribunal would have to be provided by other organizations of the United Nations family, such as the technical experts on the law of the sea, who would come from other organizations and the monetary expenditure by those organizations in providing those services would need to be reimbursed by the Tribunal. Paragraph 2 of the article deals more specifically with administrative, technical or fiscal services or facilities.

79. Some delegations were of the view that it would be better to postpone discussions on paragraph 2 until the document on the administrative structure of the Tribunal is discussed and the initial proposed financing of the Tribunal is known.

80. One delegation, as a compromise, proposed the following redraft of the article: "the terms of financing or payment of special services or expenses which may occur in the relations between the United Nations and the International Tribunal shall be determined in each case on the basis of appropriate arrangements between them".

Article 17: Liaison

81. No comments were made on this article.

Article 18: Implementation of the Agreement

82. The only comments made on this article was the suggestion that the United Nations should be referred to by name instead of using the word "Organization".

Article 19: Revision / Amendment

83. This article was introduced as a revision and safeguard clause.

84. Some delegations pointed out that it should be clearly stated that the meeting of States Parties would have to approve any revision to the Protocol.

85. The Secretary informed the delegations that article 18 dealt with the necessary concordance between the supplementary agreement and the principal instrument. Article 19, however, dealt with the review and amendment of the principal instrument and therefore had to go back to the constitutive bodies, i.e. the General Assembly and the Meeting of the States parties.

86. It was further suggested to separate the part dealing with revision or amendment from the part dealing with the time period in this article. Furthermore, it was pointed out that there was a discrepency between the title of the article and the content.

87. It was agreed to include the word "amendment" in the article.

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Article 20: Entry into force

88. One delegation proposed to move this article to come after article 18. Another delegation proposed to add the full name of the agreement in the article. It was agreed that should the Preamble not be retained, these proposals would be considered by the Secretariat.

89. After reviewing the substantive provisions of document LOS/PCN/SCN.4/WP.9, the Special Commission decided to come back to the Preamble as it had earlier agreed upon.

Preamble

90. Before the paragraph-by-paragraph discussion began, the Secretary introduced the Preamble stating that the Preamble was very important given the background of the negotiations of the statute of the Tribunal and that the link between the United Nations and the International Tribunal for the Law of the Sea is found neither in the Charter nor in the Statute. The Secretary also stated that the first paragraph sets out the objectives of the Protocol. Paragraph 2 recalls the General Assembly efforts which led to the convening of the Conference and paragraph 3 describes the role of the Tribunal. Paragraph 4 states that the Tribunal should conduct its activities in accordance with the Statute and the Charter of the United Nations. Special reference to article 297 of the Convention which refers to the system of settlement of disputes is contained in paragraph 5. Paragraph 6 seeks to establish the link, while paragraph 7 deals with the International Court of Justice and its link to the Tribunal.

Paragraph 1

91. Some delegations were of the view that the document should try to refer more particularly to the Law of the Sea. A proposal was made to add the following words in the paragraph: "Particularly in the field of the the Law of the Sea".

92. Other delegations however considered paragraph 1 not necessary and proposed its deletion. One other delegation proposed that the paragraph be merged with paragraph 6.

Paragraph 2

93. Several delegations were of the opinion that the Preamble should be shortened and suggested that, since paragraph 3 already reflects the relationship between the United Nations and the Tribunal, the following should be done in order to shorten the Preamble. Some other delegations therefore proposed either (a) to delete the last line of paragraph 2 from the phrase "which inter alia ...Law of the Sea", (b) to merge the paragraph with paragraph 3, or (c) to delete paragraph 2.

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94. One delegation suggested to delete the phrase "for the adoption of a Convention..." in paragraph 2 if the two paragraphs were to be merged. He proposed the following wording: "Bearing in mind that the General Assembly of the United Nations, in its resolution 3067(XXVIII) of 16 November 1973 decided inter alia to convene the Third United Nations Conference on the Law of the Sea, bearing in mind also the article 287, paragraph 1 (a) of the Convention and annex VI thereto established the International Tribunal for the Law of the Sea with a central role in the settlement of disputes thereunder."

95. Other delegations however prefered to have two separate paragraphs which should be redrafted taking into account of the fact that there were two ideas: a) history of the Convention and b) that the Tribunal was the central organ for the settlement of disputes.

Paragraph 3

96. Several delegations suggested that the Secretariat redraft the paragraph taking into account the comments made while discussing paragraph 2. One delegation drew attention to the fact that merging or deleting paragraphs should be thought of carefully and that it should not be done on an ad hoc basis.

97. Clarification was sought by one delegation as to the use of the phrase "central role" since this terminology was not stated in the Convention.

98. In response to the question posed, the Secretary recalled article 287 of the Convention and those disputes for which the Tribunal (Sea Bed Disputes Chamber) was competent especially those relating to the prompt release of vessels and crews. The Secretary further stated that throughout Part V of the Convention reference was constantly made to the Tribunal.

Paragraph 4

99. Several delegations were of the view that the paragraph lacked clarity. They, therefore, proposed its deletion failing that a specific reference to the "principles of international law" should be made in the paragraph.

100. One delegation proposed to delete any reference to the fact that the Tribunal would be working for international peace and Justice.

Paragraph 5

101. The following proposal was made by one delegation for this paragraph which was supported by all delegations: "Noting the role of the United Nations in the peaceful settlement of international disputes and also the the responsabilities entrusted to the Secretary-General of the United Nations under article 319 and other provisions of the Convention."

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Paragraph 6

102. Clarifications was sought by some delegations as to the reference to specialized agencies and to the principal organs of the United Nations. In response, the Secretary referred to article 2, paragraph 2 of the Annex III and also stated that throughout the Convention the reference to competent international organization was made. He explained that the two principal organs contemplated were: the Security Council and the International Court of Justice.

103. Another delegation suggested to reformulate paragraph 6 by adding the words: "on the other hand" after the words "International Tribunal". Some delegations supported this proposal.

Paragraph 7

104. Some delegations were of the view that the International Court of Justice should not be placed on the same level as the Tribunal. Others however felt that the paragraph was impose an obligation on States to bring disputes relating to the sea before the two bodies. It was therefore suggested to delete the phrase from: "International Court of Justice" up to the word "purpose." This problem did not however exist in the Spanish text.

105 Since the present document is a summary of discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions and these will be taken into account when redrafting the document. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being informed.

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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Tenth session
Kingston, Jamaica
24 February-13 March 1992

BUILDING REQUIREMENTS AND FACILITIES FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA IN HAMBURG

(Report of the German Delegation)

1. We refer to the Report on the Progress of Work concerning the Building of the International Tribunal for the Law of the Sea in Hamburg submitted on 13 March 1991 1/ and to the previous reports in this connection 2/.

2. The Report presented in 1991 provides a brief description of the international architectural competition that was held in 1988 and 1989 for the design of a suitable building to house the International Tribunal for the Law of the Sea at the site in Hamburg 3/. The international jury for the competition awarded the first prize to the architects, Baron Alexander and Baroness Emanuela von Branca. The competition is documented in a brochure issued by the Federal Minister for Regional Planning, Building and Urban Development in 1990. This document was distributed to the Members States of the United Nations and to participants of the Preparatory Commission in 1990 and 1991 and is still available to interested parties.

3. Since then, further steps have been taken in finalizing the design and the current stage of planning will be documented in an additional brochure under preparation by the City of Hamburg and will be issued in due course, probably at the resumed Tenth Session of the Preparatory Commission.

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4. In keeping the Preparatory Commission, in particular Special Commission 4, abreast of developments, the German Delegation can now provide further information on the specifications and progress of planning for the building of the Tribunal.

5. The selected architects have submitted more detailed drafts for the construction of the building. On this basis a budgetary document was produced and agreed upon by the competent German authorities (the Federal Ministry of Justice, the Federal Ministry for Regional Planning, Building and Urban Development, the Finance Authorities of Hamburg) and the architects.

6. This budgetary document is based on a revised and approved accommodation plan which designates 5,700 square metres of floor space, representing an increase of 1,317.4 square metres over the plan submitted in 1988. Details of the specifications and space allocations are provided in the annex hereto.

7. Most recently the plans were further developed, and in particular with respect to the following components:

I. Entrance area

The main entrance area and adjacent areas of the proposed building for the Tribunal have been re-designed and re-organized to offer more attractive and improved facilities to the users. The different levels of the building are now connected by wide ramps and stairways. A spacious cloakroom has been included in the entrance area. The library with its reading room has been re-oriented and overlooks the entrance area. The snack-bar located in this area is re-designed. Special attention has been given to visitors' access checks and to separating public areas from areas restricted for internal use.

II. Main Court Room and Meeting Rooms for Chambers

The building for the Tribunal will provide a main court room for plenary sittings and public events as well as for two court rooms for the chambers. Adjacent to the main court room and to the chambers there will be meeting rooms for private sittings of the Tribunal. The main court room in combination with the two chambers can be transformed into one large auditorium for meetings of the States Parties to the United Nations Convention on the Law of the Sea and for public events.

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III. Offices

The offices of the President and Vice-President are located on the first floor. The offices of the President and the Vice-President are each 43 square metres in size and are given a more formal design to correspond with similar rooms of the International Court of Justice in the Hague. The offices of the President and Vice-President of the Tribunal each have connected suites with reception areas and private rooms comprised of a robing room, restroom and pantry/kitchenette. The President's secretariat is located between the offices of the President and of the Vice-President.

The offices of the President of the Chamber with the related registry in front of it are also located on the first floor with a combined area of 37 square metres.

The Registrar's office totals 36-37 square metres in area and taken together with that of the Deputy Registrar and the Registry, they form a functional unit on the ground floor.

IV. Restaurant

The existing 19th century Villa on the premises of the Tribunal will be converted into a restaurant. The Villa is connected to the new building by a covered passageway.

V. Disabled persons

The plans for the construction of the new building and for restoring the Villa were revised to accommodate the needs of disabled persons. All lifts, doorways, corridors, ramps and passageways and restrooms have been made suitable for access by persons in wheelchairs to all levels.

VI. Security

In addition to the security requirements previously contemplated, a high security scheme for the premises of the Tribunal has also been elaborated in cooperation with the Hamburg Criminal Police. High-level security measures are envisaged which include:

- a special high-security entrance to the building via the underground car park, for use by individuals at risk;

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- suitable rooms to accommodate individuals at risk in the case of sudden threat or danger (e.g. consultation rooms next to sittings rooms);

- access from public areas to internal areas achieved by security measures including access control systems and by means of consistent spatial separation;

- special requirements placed upon particular features of the building, e.g. the inclusion of windows and doors resistant to break-ins and gunshot;

- technical security measures, e.g.
  - emergency police telephone,
  - visitor screening apparatus with code systems,
  - telecommunications systems protected against sabotage.

VII. Further stages of work

After completion of the present stage of detailed design, the plans and the budgetary document will be submitted to the Budgetary Committee of the Bundestag (Federal Parliament) for approval. Thereafter, a document for the building execution is to be produced. On that basis the building of the Tribunal will be erected.

In accordance with the decision of the Government of the Federal Republic of Germany in 1987, the necessary financial resources are available 4/.

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Notes

1/ Report on the Progress of Work dated 13 March 1991 concerning Building Requirements and Facilities for the International Tribunal for the Law of the Sea in Hamburg - Statement of the Parliamentary State-Secretary, H. E. Mr. Rainer Funke, Ministry of Justice of the Federal Republic of Germany [LOS/PCN/SCN.4/1991/CRP.40, 15 March 1991].

2/ Brief Progress Report dated 2 September 1986 on the Preparations for the Housing of the International Tribunal for the Law of the Sea [LOS/PCN/SCN.4/L.6, 2 September 1986]; Second Progress Report dated 13 March 1987 on Practical Arrangements for the Installation of the International Tribunal for the Law of the Sea in Hamburg [LOS/PCN/SCN.4/L.8, 13 March 1987].

3/ Report of the Secretary-General dated 20 October 1988 on Developments Relating to the International Tribunal [UN Doc. A/43/718, 20 October 1988, p.46]; Report of the Secretary-General dated 1 November 1989 on Developments Relating to the International Tribunal [UN Doc. A/44/650, 1 November 1989, p. 40].

4/ Letter dated 9 February 1987 from the Chairman of the Delegation of the Federal Republic of Germany addressed to the Special Representative of the Secretary-General for the Law of the Sea [LOS/PCN/80, 12 March 1987].

ANNEX

Code No.*	Designation of areas	Size square metres
1.-12.	ROOM SCHEDULE	
1.0	Entrance area	898.3
2.0	Presidency	211.6
3.0	Judicature	1.227.0
4.0	Chambers and meeting rooms	963.8
5.0	Registry	250.5
6.0	Administration of the Judicature	451.2
7.0	General Administration	692.6
8.0	Library	173.8
9.0	Catering	323.8
10.0	Fitness and health facilities	132.0
11.0	Workshops and storage	283.5
12.0	Caretaker's apartment/flat	112.5
Total		5.720.6

* The code numbers correspond to the specificiations in the Plan.

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Code No.*	Designation of areas	Size square metres
1.0	ENTRANCE AREA	
1.1	Entrance Hall	797.8
1.2	Telephone and communication	30.5
1.3	Video facilities	Entrance Hall
1.4	Bank counter	25.0
1.5	Postal counter	12.5
1.6.1	Porter's lodge	Entrance Hall
1.6.2	Identity badge room	7.5
1.6.3	Porter and security offices	25.0
	Visitors' zone	Entrance Hall
Total		898.3

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Code No.*	Designation of areas	Size square metres
2.0	PRESIDENCY	
2.1	President's office	43.0
2.2	Conference room	37.5
2.3	Secretariat	14.5
2.4	Rest room	10.4
2.5	Pantry	3.9
2.7	Vice-President's office	43.0
2.8	Secretariat	14.5
2.9	Rest room	10.4
2.10	Pantry	3.9
2.12/3	Offices	18.5
2.14	Archives	12.0
Total		211.6

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Code No.*	Designation of areas	Size square metres
3.0	JUDICATURE	
3.1	President of the Seabed Disputes Chamber	36.5
3.2	Secretariat	18.5
3.3	Offices	24.0
3.4	18 judges offices	639.0
3.5	4 judges offices (ad hoc judges)	148.0
3.6	9 Secretaries	129.8
3.7	Archives	119.2
3.8	Reserve space	112.0
Total		1.227.0

Code No.*	Designation of areas	Size square metres
4.0	CHAMBERS AND MEETING ROOMS	
4.1	Main Court Room (public)	257.0
4.2	Chambers (public)	215.0
4.3	Meeting rooms (private)	56.3
4.4	Meeting rooms (private)	70.0
4.5	Conference rooms for parties to a dispute	98.0
4.6	Interpreter rest room	24.5
4.7	Rest rooms for officials	75.0
re 4.2	Interpreters and other technical services	48.0
re 4.1	Interpreters and other technical services	96.0
re 4.3/ 4.4	Interpreters and other technical services	24.0
Total		963.8

Code No.*	Designation of areas	Size square metres
5.0	REGISTRY	
5.1	Registrar	36.5
5.2	Deputy Registrar	30.0
5.3	Secretaries	30.5
5.4	Filing room	12.0
5.5	Additional office space	12.0
5.6	Press office	12.0
5.7	Central archives	67.5
5.8	Storage	22.5
5.9	Archives for confidential material	27.5
Total		250.5

Code No.*	Designation of areas	Size square metres
6.0	ADMINISTRATION OF THE JUDICATURE	
6.1-3	Offices	42.5
6.7	Offices	36.0
6.10	Offices	96.0
6.12	Offices	48.0
6.4	Secretaries	12.0
6.5	Record department	12.0
6.6	Meeting rooms	12.0
6.8-9	Conference services	37.0
6.11	Reference library	43.7
6.13	Reserve space	112.0
Total		451.2

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Code No.*	Designation of areas	Size square metres
7.0	GENERAL ADMINISTRATION	
7.1	Director	25.0
7.2	Secretariat	18.5
7.3-6	Offices	328.0
7.7	Secretarial staff	86.5
7.8	Record department	12.0
7.9	Meeting Room	12.0
7.10	Messenger room	24.5
7.11	Messenger	18.5
7.12	Printing and copying facilities	68.0
7.13	Tea kitchen	12.0
7.14	Computer room	75.0
	Copying room	12.6
Total		692.6

Code No.*	Designation of areas	Size square metres
8.0	LIBRARY	
8.1	Library	173.8
Total		173.8

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Code No.*	Designation of areas	Size square metres
9.0	CATERING	
9.1	Dining room	169.0
9.2	Service room	19.6
9.3	Cafetaria	135.2
9.4	Rest room	
Total		323.8

Code No.*	Designation of areas	Size square metres
10.0	FITNESS AND HEALTH FACILITIES	
10.1	Fitness and health facilities, storage space	132.0
Total		132.0

Code No.*	Designation of areas	Size square metres
11.0	WORKSHOPS AND STORAGE	
11.1	Workshop	75.0
11.2	Caretaker's room	12.5
11.3-4	Staff rooms	68.0
11.5	Tea kitchen	5.0
11.6-9	Storage facilities	123.0
Total		283.5

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Code No.*	Designation of areas	Size square metres
12.0	CARETAKER'S FLAT	
12.1	Caretaker's flat	112.5
Total		112.5

Code No.*	Designation of areas	Size square metres
13.0	SANITARY FACILITIES	
13.1	Sanitary facilities	.
Total		.

Code No.*	Designation of areas	Size square metres
14.0	TECHNICAL SERVICES	
14.1	Technical services	.
Total		.

Code No.*	Designation of areas	Size square metres
15.0	CAR PARKING	
15.1	Underground	110.0
15.2	Ground level	34.0
Total		144.0

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TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

BUILDING REQUIREMENTS AND FACILITIES FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA IN HAMBURG

(Presented by the delegation of Germany)

In its report contained in document LOS/PCN/SCN.4/L.16 of 9 March 1992 the delegation of Germany informed the Preparatory Commission of the further steps taken in finalizing the design and planning for the site and building to accommodate the Tribunal. In paragraph 3 of that document, reference was made to an additional brochure to be circulated. In accordance therewith, information on the final design with illustrations, drawings and specifications has now been circulated to all Member States of the United Nations, to the States participating in the Preparatory Commission and to the secretariat of the Commission.

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Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Principles governing a relationship arrangement between the International Tribunal for the Law of the Sea and the International Seabed Authority

(LOS/PCN/SCN.4/WP.10)

1. During the summer meetings of the eighth session of the Preparatory Commission, at its 124th and 125th meetings, Special Commission 4 considered a working paper prepared by the Secretariat entitled "Principles governing a relationship arrangement between the International Tribunal for the Law of the Sea and the International Seabed Authority" (LOS/PCN/SCN.4/WP.10).

Introduction of the working paper

2. In introducing the working paper, the Secretary said that the paper should be considered in the context of precedents, primarily Article 57 of the Charter of the United Nations, and existing relationship arrangements. However, since the current arrangement was different from those envisaged in Article 57, it had been necessary to spell out some of the issues. The paper did not attempt to reach any conclusions, but rather attempted to explain the functions of the International Tribunal for the Law of the Sea and the International Seabed Authority as they related to each other. The working paper did not, however, cover every case where a relationship might have to be regulated. The traditional practice of entering into a relationship arrangement for a specific purpose was not applicable in this case. No attempt had been made to formulate texts. The document only highlighted the types of issues that could be covered.

General comments on the working paper

3. The question was raised as to whether there was a precedent empowering two organs created by the same convention to conclude a further agreement between themselves. While it was felt by several delegations that an agreement could be concluded, doubts were expressed over whether it was really needed and it was

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pointed out that the Commission would need to take a decision on the question. One delegation said that if there were to be any cooperation then this should only relate to administrative matters, and even then there was no need for an agreement. It was felt that the independence of the Tribunal should be maintained at all costs and that it should not be influenced in its decision-making. Another delegation noted that, since the Tribunal and the Authority were completely independent and the United Nations Convention on the Law of the Sea did not say how they were connected, an agreement was needed to establish a link between them.

4. It was pointed out that, since the Tribunal and the Authority had been established by the same Convention, there was no need for the working paper to deal with issues which had already been provided for in the Convention; mere repetition of the provisions of the Convention should be avoided. One delegation disagreed, noting that what the Commission was considering at the current stage were principles and not draft articles.

Comments on specific sections

Section I. Preamble

5. It was pointed out that the comments on the preamble of working paper 9, entitled "Draft Agreement on Cooperation and Relationships between the United Nations and the International Tribunal for the Law of the Sea" (LOS/PCN/SCN.4/WP.9), would also apply to the preamble of the working paper currently under consideration.

6. One delegation noted that the Tribunal was not an international organization in the normal sense and that one could not therefore say that the agreement was between two organizations.

7. The view was expressed that paragraphs 1 and 2 should be reversed, while a contrary view held that the preamble should first state the objective of the agreement, as contained in paragraph 1. With regard to paragraph 3, it was pointed out that reference should be made to the objectives of the Convention instead of the preamble to the Convention.

Section II. Governing principles and mutual recognition of responsibilities, rights and obligations

8. Some delegations pointed out that the Tribunal was not a judicial "organ" but a judicial "body" or "institution" and that it should be referred to as such.

9. The need to provide for mutual recognition was questioned by some delegations, since the Tribunal and the Authority had been created by the same Convention. One delegation thought that it was the Tribunal's ability to conclude agreements which should be elaborated on.

Section III. Consultation, cooperation, coordination and recommendations

10. Several delegations felt that in a follow-up paper, section III should not be drafted in such detail, but rather be reduced to areas where there was a precise statement of the need for cooperation in accordance with the provisions of the Convention. The Tribunal and the Authority should be left to work out the details of cooperation and coordination at a later stage. The Special Commission should avoid giving the impression that it was creating a large bureaucratic structure.

11. Some delegations emphasized that the Tribunal, as an independent judicial body which could pass judgement on the actions and activities of the Authority, should not be influenced by the Authority. Thus one delegation did not think that the Tribunal should cooperate and consult with the Authority; while another said that care should be taken with the provision in paragraph 5 which called for regular consultations to ensure that the Tribunal would not be influenced by the Authority. That delegation also opposed any influence on the staff by either the Tribunal or the Authority.

12. One delegation considered paragraph 5 ambiguous enough to allow for any type of arrangement. Clarification was sought by another delegation as to the meaning of the last sentence. The Secretary explained that the essence of a relationship arrangement was that one organization could facilitate the activities of the other and that the last sentence was intended to provide for such a situation. Without a cooperation arrangement the Tribunal would not be able to get technical advice, support or assistance when dealing with highly technical matters. This type of cooperation would entail minimal financial implications.

13. Some delegations pointed out that some paragraphs in Section III merely repeated the provisions of the Convention and were thus not very useful. One delegation expressed support for the retention of paragraphs 9, 11 and 12, but believed that paragraph 12, which dealt with information, should be moved to section IV. Another delegation was of the opinion that some of the issues in section III, especially in paragraph 12, could be dealt with in the Rules of the Tribunal.

Section IV. Exchange of information and documents

14. It was pointed out by one delegation that the exchange of information and documents might not require even administrative regulations, but that it would be in the interest of the Tribunal and Authority to do so without resorting to an agreement. Some delegations were of the view that the Tribunal should not furnish special reports to the Authority, leaving the Registry overloaded with work. While not opposed to the principle of exchange of information and recognizing that the Tribunal and the International Court of Justice might need to exchange information and documents, one delegation could not conceive what type of information the Tribunal could present to the Authority, and therefore thought that section IV should be deleted. He said that there was both too much and too little in paragraph 13. Another delegation believed that the exchange of information should be limited to administrative matters, because information

regarding pending cases could result in the Tribunal being influenced by the Authority. It was noted that the Authority was political in nature whilst the Tribunal was purely judiciary and that the independence of the Members had to be maintained.

15. With regard to paragraphs 14 to 16, one delegation found it hard to understand why paragraph 14 had been included in the document, since advance information could not be given in an emergency situation. Support was expressed by that delegation for the retention of paragraphs 15 and 16. Another delegation considered paragraph 16 unacceptable on the ground that the Authority should not receive preferential treatment before the Tribunal; questions, other than seabed mining, such as those involving fishing, pollution, etc., were of equal economic importance.

Section V. Reports

16. Several delegations saw no need for a separate section on reports and proposed that they be dealt with under section IV on exchange of information and documents. One delegation believed that section V contradicted the idea of the independence of the Tribunal.

17. One delegation said that the first sentence of paragraph 18 lacked clarity. With respect to the second sentence of paragraph 18, it was pointed out by some delegations that there was no need for the Tribunal to report to the Authority on its jurisprudence. The annual report of the Tribunal would be distributed to all members and the Authority could review the jurisprudence of the Tribunal on its own. The Tribunal had an independent personality on which the Authority should not exert any influence. One delegation suggested replacing the word "review", which had a legal implication, with the words "acquaint itself". Another delegation was of the view that the second sentence had no basis in the Convention and should therefore be deleted. The rendering of an advisory opinion was limited to the Seabed Disputes Chamber.

18. Some delegations did not think that the hypothesis presented in paragraph 19 should be regulated in that paragraph, but believed that practice would resolve the problem. One delegation held the view that the amendment process referred to in paragraph 19 called for cooperation rather than reports and that it should therefore be considered under section III. Another delegation was of the opinion that it should be considered under section IV and that thought should be given as to whether a procedure needed to be established.

Section VI. Administrative cooperation and personnel arrangements

19. One delegation expressed doubts about the usefulness of paragraph 20, and another noted that its provisions should not be automatic given the fact that the Tribunal and the Authority both had their own juridical personality and thus could choose to establish a relationship for administrative cooperation and personnel arrangements. Some delegations pointed out that the draft agreements between the United Nations and the Authority and the United Nations and the Tribunal already established a link with the International Civil Service Commission (ICSC) and that there was thus no need to mention such a link in the

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working paper under consideration and repeat provisions already included in those earlier agreements. One delegation said that the cooperation envisaged in paragraph 20 should only take place if either the Tribunal or the Authority decided not to have a relationship with ICSC, while another delegation believed that the Tribunal and the Authority should cooperate in any event to ensure uniformity regarding conditions and terms of service, levels of salary, etc.

20. With respect to paragraph 21, it was noted that the Secretariat had given many possibilities but no solution. While one delegation considered the Seabed Disputes Chamber to be the appropriate forum to address issues raised under article 168, paragraph 3, of the Convention, another believed that it was not. Misgivings were expressed about having the Tribunal act as the court of first instance in disputes involving the Authority and its staff. One delegation said that the Commission should not express itself on a contentious issue such as the Authority's mechanism of choice for dispute settlement. Support was expressed by another delegation for the retention of paragraph 21.

Section VII. Budgetary and financial arrangements

21. Some delegations noted that the words "close budgetary and financial relationships" in paragraph 22 required clarification, since they could be interpreted to mean that the Authority and the Tribunal were financially dependent upon each other. One delegation questioned the need for such a close relationship and suggested that section VII should only contain a provision on how the contribution by the Authority to the Tribunal's budget would be made. In that connection, it was noted that a sounder mechanism than consultation was needed to determine the level and method of payment of the Authority's contribution to the Tribunal's budget.

22. It was pointed out by one delegation that while article 19, paragraph 1, of the Statute provided for the contribution to the costs of the Tribunal by the Authority, that relationship should not prejudice the independence of the Tribunal, e.g., the Authority should not be allowed to restrict its contributions to the Tribunal's budget when it was dissatisfied with the latter's judgements.

Section VIII. General

23. Supporting what was stated in the last sentence of paragraph 24, namely that "most of the instances cited in the present paper could be brought under a single broad definition of cooperation, consultation and exchange of information", some delegations saw no need for detailed consideration of the issues as currently contained in the working paper.

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Special Commission 4

Chairman's summary of discussions on the report with recommendations concerning the initial financing and budget of the Tribunal (LOS/PCN/SCN.4/WP.11)

1. During the summer meetings of the tenth session of the Preparatory Commission (New York, 10-21 August 1992), Special Commission 4 took up the issues concerning the initial financing and budget of the International Tribunal for the Law of the Sea, on the basis of a working paper prepared by the Secretariat (LOS/PCN/SCN.4/WP.11). Following its usual practice, the Special Commission decided to examine the document part by part.

2. Introducing the working paper, the Secretary stated that the document outlined, in general terms, alternatives as to how a new international body might be financed. The paper had been drafted taking into account the practice followed in the establishment of the United Nations, its agencies and bodies. However, it was to be borne in mind that the Tribunal was not an international organization with a constituent political body, but a judicial body. There was no known precedent for setting up such an international tribunal, independent of any umbrella organization. For those reasons, he pointed out, the document should be treated as an information paper indicating specifics relevant to the Tribunal. It would be up to the Meeting of States Parties to guide the Tribunal in this matter.

Introductory note and part I

3. There were no comments with respect to these parts of the paper, which proposed the division of the financing and budgetary recommendations into two sections, the first dealing with the preliminary requirements for the initial establishment and early functioning, and the second dealing with the permanent arrangements of a long-term nature.

4. It was generally felt that the document did not make recommendations. Since the subject was important, the Special Commission should formulate

recommendations since this would facilitate decision-making, bearing in mind that the Tribunal was, sui generis, independent and financially autonomous. One delegation indicated that the document should be such as to permit formulating clear recommendations to the Meeting of States Parties. The recommendations should take account of the fact that at the outset the workload would be light and that initially there would be no need for 21 judges in view of the financial burden of such an arrangement: thus there should be a phasing-in of the Tribunal, which should be reflected more precisely in part II of the working paper. What was needed was clear specifications and a comprehensive document.

Part II - Governing principles

5. One delegation inquired as to the meaning of the words "to be applied" in paragraph 5 of the document. The Secretary explained that when making arrangements for a new international body, the fiscal policy is formulated as governing principles and it is left to the body - in this instance the Tribunal - to work out the specifics. The governing principles should be formulated by the Meeting of States Parties. An analogy was drawn to the deliberations of the Special Commission concerning the phasing-in of the Tribunal (LOS/PCN/SCN.4/WP.8/Add.2). Another delegation expressed concern about the mandatory form of presentation, given its financial implications.

6. It was suggested that document LOS/PCN/SCN.4/WP.11 be expanded so that all budgetary questions regarding the Tribunal would be combined in one document that gave a comprehensive view on the financial implications of the Tribunal. The Chairman stated that such a task would not be possible owing to the lack of time. He explained that working papers LOS/PCN/SCN.4/WP.8 and Add.1 and 2 dealt with issues concerning the administration and consequential financial implications and budgeting, while LOS/PCN/SCN.4/WP.11 dealt with how money could be raised initially to finance the setting up of the Tribunal. It was agreed that a footnote or a cross-reference to documents LOS/PCN/SCN.4/WP.8 and Add.1 and 2 would take care of that concern.

7. The view was reiterated that LOS/PCN/SCN.4/WP.11 should make clear-cut and specific recommendations to the Meeting of States Parties. The discussions on the working paper should be reflected in the final report to the Preparatory Commission. Another view, expressed by the Chairman, was that the Preparatory Commission was in a position to suggest well-defined solutions based on juridical principles, but that in the present case under consideration, the problems were of a financial nature and thus were unpredictable, and therefore required a flexible approach in the solutions suggested.

8. A general remark was that the paper should also take account of the recent experience or practice of international jurisdictions and of regional bodies, such as the Tribunal of the Organization of Arab Petroleum Exporting Countries (OAPEC). It was agreed that reference should be made to such experience, as appropriate.

Part III - Provisional arrangements

9. There were no comments on part III.

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Part IV - Working Capital Fund

10. There were no comments on part IV as well.

Part V - Alternative sources of initial funding

11. Some delegations were of the view that an individual State should not be responsible for the initial financing of the Tribunal, which was intended to be an independent and neutral institution. Therefore one delegation suggested the deletion of the reference in paragraph 14 that gives, as an example for an alternative source of initial financing, the example of the United Nations University, which was financed by an endowment from the host country. This example was considered misleading. Other delegations, however, insisted on keeping the example since it constituted an appropriate example of an alternative source of financing the Tribunal.

12. The Chairman offered the following sentence as a compromise: "Although the United Nations University is different from the Tribunal, it nevertheless constitutes a useful example." It was also suggested and agreed to look into the practice of the Permanent Court of International Justice (PCIJ), established under the League of Nations, for inclusion in the final report.*

Part VI - The Provisional Financial Regulations

13. One delegation was of the view that the drafting of the paragraph suggested that additional working papers would need to be prepared. Since this was inappropriate, owing to the lack of time, it was suggested to redraft the paragraph or to merge it with part III which dealt with the same issues. It was argued that the Commission could draft such regulations and that thus the document to be submitted to the Meeting of States Parties would be more comprehensive. Another delegation was of the view that the Special Commission could not draft financial regulations.

14. Since the present document is a summary of discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions and these will be taken into account when redrafting the document. Should any participant feel that an important matter has been omitted, the Chairman would appreciate being so informed.

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* Consequent upon the request of the Special Commission, the Chairman reviewed the results of the Secretariat's research on the experience of the PCIJ. For the convenience of delegations, a summary of that information is contained in the annex to the present report.

Annex

THE FINANCES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE a/

1. Method of meeting the Court's expenses. When the plans for the establishment of the Court were being completed in 1920, the Court was regarded as an organ of the League of Nations. b/ This partly explains why its founders did not envisage any independent method for meeting the Court's expenses.

2. Since agencies had been created for collecting and disbursing the funds of the League of Nations, it would have entailed both duplication and difficulty in 1920 to have created an independent method of financing the Court; and the view that the Court was to be an organ of the League led quite naturally to the provision in Article 33 of the Statute that "the expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council" ... The provisions of the Statute do not place on a party to the Protocol of 16 December 1920 any obligation to contribute to the budget of the Court, and it is only under the decisions of the Assembly that States Members of the League of Nations are obligated to contribute. The obligation to contribute rested on all Members of the League of Nations, even if they were not parties to that Protocol. c/

3. The League of Nations budget for the Court. The annual budget of the League of Nations was divided into parts, one of which was the budget for the Court. This was voted by the Assembly of the League each year, for the following calendar year. Each Member of the League was obligated to contribute to this budget, whether or not it was a party to the Protocol of Signature of 16 December 1920. d/

4. Preliminary budget arrangements. The first two budgets of the League contained items to cover the expenses necessary for the establishment of the Court, e/ and the third budget, for 1921, adopted in 1920, included an item of 650,000 francs (later reduced to 500,000 francs) for the Court's expenses. f/ In the fourth budget, for 1922, the item was for 1,500,000 francs. As from 21 February 1922, the Court's services took over from the Secretariat of the League of Nations the accounts and the administration of funds placed to its credit at The Hague. g/, h/

5. Premises occupied by the Court. Each year the budget of the Court includes an item for meeting the expenses of the premises occupied by the Court, and the topic therefore calls for consideration in connection with the Court's finances. The existence of the Peace Palace at The Hague was one of the factors which led to the selection of The Hague as the seat of the Court. i/ That Palace was a gift by Andrew Carnegie to the Carnegie Foundation, a corporation organized under the laws of the Netherlands. Negotiations were begun in 1921 between the Secretary-General of the League of Nations and the President of the Board of Directors of the Carnegie Foundation, with a view to reaching an arrangement concerning the Court's occupancy of the Peace Palace. The arrangement provided for the Court's exclusive use of certain parts of the Peace Palace and the non-exclusive use of other parts, for which the League of Nations was to pay an annual sum of 50,000 florins. The arrangement was later extended and a

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permanent arrangement was negotiated which became effective from 1924 with the annual contribution by the League of Nations being reduced to 40,000 florins. The space available to the Court under this arrangement was grossly inadequate, as it did not even admit of a separate office for each of the judges; and in 1927 a supplementary arrangement was negotiated to meet the needs of the Court more adequately. j/ Additional space was to be made available by a remodelling of parts of the Peace Palace, for the purpose of which the Netherlands Government advanced to the Foundation 240,000 florins as a loan without interest. To enable the Foundation to repay this loan, it was agreed that the League of Nations should pay the Foundation the additional sum of 10,000 florins each year from 1929 to 1952. The remodelling was completed in 1929. k/ The available space again proved to be inadequate when in 1930 the number of judges was increased from 11 to 15, and in 1929 negotiations were opened with a view to meeting the Court's new needs. A plan was approved after prolonged negotiations and put into effect on 1 December 1932, by a rider to the arrangement of 1924. l/ Under this plan, the Court was to have new space available, necessitating the removal of the Academy of International Law to a building to be constructed on the grounds of the Peace Palace. For this purpose, the Netherlands Government advanced 273,400 florins as a loan without interest, and this sum was to be repaid by the League of Nations to the Carnegie Foundation, in annual instalments of 10,000 florins payable until 1960. The budget of the Court for 1933 included an item of 60,000 florins for payment by the League of Nations to the Carnegie Foundation. m/ The cost of the premises occupied by the Court is an item in the independent budget of the Court, but the responsibility for the arrangements with the Carnegie Foundation rests with the Secretary-General of the League of Nations. In this respect, the Court has not assumed the independence which it enjoys in connection with other parts of its budget; n/ however, the negotiations on behalf of the Secretary-General are frequently conducted by the Registrar of the Court.

Notes

a/ Extracted from The Permanent Court of International Justice, A Treatise, by Manley O. Hudson (New York, Macmillan, 1934), pp. 297-312.

b/ See ibid., para. 98.

c/ Ibid., para. 352.

d/ Ibid., para. 353.

e/ Records of First Assembly, Committees, II, pp. 106, 107, 118.

f/ Records of First Assembly, Plenary, p. 707. The Council had previously approved a memorandum by the Secretary-General which proposed an item of 1,500,000 francs for the Court. Ibid., Committees, II, p. 122.

g/ Ibid., Series E. No. 1, p. 279.

h/ The Permanent Court ... (see note a above), para. 355.

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i/ It is referred to in the report of the 1920 Committee of Jurists, Minutes, p. 718.

j/ Records of First ... (see note e above), Series E, No. 4, pp. 63-67.

k/ Ibid., No. 5, pp. 78-80.

l/ Ibid., No. 9, pp. 48 ff.

m/ League of Nations Official Journal, 1932, p. 1669.

n/ Chattels used by the Court, such as furniture and office equipment, seem to be the property of the League of Nations. The question has been mooted whether the Court has a juridical personality, enabling it to hold, lease and transfer property; but it seems quite unimportant for all practical purposes.

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PREPARATORY COMMISSION FOR
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AUTHORITY AND FOR THE
INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Use of the United Nations laissez-passer by the Tribunal and its officials

1. At the first meeting of Special Commission 4, several items were identified for consideration by the Special Commission, among them two relevant issues with regard to the use of the United Nations *laissez-passer*:

(a) Elaboration of a draft headquarters agreement with the host country;

(b) Preparation of an agreement relating to the privileges and immunities of members and other officers of the Tribunal, etc.

2. The item on the headquarters agreement was defined as follows:

> "The question of the headquarters agreement covers several aspects of the relationship between the Tribunal and the host country besides matters pertaining to the site alone. Within the broad context of the headquarters agreement, consideration would also need to be given to aspects of the relations with the host country such as the status, privileges and immunities to be accorded to: the Members, Registrar, officials and staff of the Tribunal who would be primarily responsible for the conduct of its work; and to parties and their representatives, witnesses, and assessors, whose presence before the Tribunal, when required, would have to be assured." (emphasis added)

3. Relevant international conventions and resolutions that have a bearing on the question were also identified. However, it was noted that with regard to the headquarters agreement per se, there was a long practice of the United Nations and its related agencies which could serve as an appropriate reference.

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4. Moreover, it was pointed out that the relationship to be established between the Tribunal and the appropriate intergovernmental bodies would have to be examined, as a separate item, in some detail.

5. A working paper (LOS/PCN/SCN.4/WP.4) was later drawn up outlining the issues for consideration with regard to the above items. In part I, entitled "Privileges and immunities", the following was stated in paragraph 5:

> "When travelling in connection with the business of the Tribunal, a member should enjoy all the privileges and immunities granted to diplomatic envoys ... When a member does not reside in the host country, he should be accorded every facility for travelling to and from the seat of the Tribunal and for entering the country free from restrictions or any requirements concerning immigration or temporary residence. Travel to and from the headquarters district should not in any way be restrained or restricted."

6. Three documents containing the issue of the laissez-passer were later drawn up by the secretariat: "Draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany" (LOS/PCN/SCN.4/WP.5/Part II (article 22) and WP.5/Rev.1 (article 23)); "Draft Convention/Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea" (LOS/PCN/SCN.4/WP.6 (article 14) and WP.6/Rev.1 (article 18)); and "Draft Agreement on Cooperation and Relationships between the United Nations and the International Tribunal for the Law of the Sea" (LOS/PCN/SCN.4/WP.9 (article 14)).

I. DRAFT HEADQUARTERS AGREEMENT BETWEEN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE FEDERAL REPUBLIC OF GERMANY

A. LOS/PCN/SCN.4/WP.5/Part II

7. The Special Commission had to determine if document LOS/PCN/SCN.4/WP.5 contained all required provisions to ensure that the Tribunal would be in a position to exercise the functions entrusted to it, unhindered and under the best conditions possible in the host country. In particular, the Commission was to ascertain whether all the immunities, privileges and facilities needed for the work of the Tribunal, its members and staff were comprehensively and precisely reflected in the draft.

8. Article 22 of the document was entitled "Laissez-passer, notifications, identity card". The article dealt with, among other things, the recognition of the laissez-passer issued by the Tribunal to its members, its Registrar and its officials and the granting of visas by the host country. Introducing the article, the Secretary pointed out that the wording basically followed paragraph 6 of General Assembly resolution 90 (I) of 11 December 1946.

9. In drafting the article it had been assumed that the Protocol adopted by the meetings of States parties on the privileges and immunities of the Tribunal would provide for the issuance of laissez-passer to Members and officials of the

Tribunal, similar to the issuance of United Nations laissez-passer by the International Court of Justice.

Paragraph 1

10. In view of the fact that the number of persons covered by paragraph 1 (a) would be relatively small, there was a general agreement in the Special Commission that it might not be appropriate for the Tribunal to issue a laissez-passer of its own. It was stated that that issue should be examined in the context of a relationship agreement between the Tribunal and the United Nations for the laissez-passer of the United Nations to apply in the case of the Tribunal. It was further argued that the specialized agencies of the United Nations also used the United Nations laissez-passer for their officials.

11. However, it was agreed that, pending a final decision on the matter, the existing provisions of paragraph 1 (a) should be retained as a basis for negotiations with the host country.

12. It was suggested, with reference to article 1 of the draft headquarters agreement (use of terms) which in subparagraph (j) regulates the use of the term "officials of the Tribunal", that the words "the Registrar" in the third line should be deleted.

Paragraph 2

13. With regard to the duty of the Registrar to notify the competent authorities concerning the persons referred to in paragraph 2, one representative pointed out that the information to be transmitted should be as precise as possible. That could be done, for instance, along the lines of paragraph 3 of the article.

Paragraph 3

14. It was stated that under paragraph 3 persons referred to in articles 18 to 20 were to be furnished with a forge-proof identity card. This includes persons who might stay in the host country only for a short time, for whom a simplified identity card could be issued to avoid the relatively high costs involved in printing.

15. It was proposed that the paragraph should follow immediately after paragraph 1 and that paragraph 2 should become paragraph 3.

Paragraph 4

16. No suggestions were made on the paragraph.

B. LOS/PCN/SCN.4/WP.5/Rev.1

17. At the tenth session of the Preparatory Commission, delegations continued the discussions on the issue.

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18. In the revised document, LOS/PCN/SCN.4/WP.5/Rev.1, delegations considered the new article 23, "Laissez-passer, identity cards and notification" in view of the relevant paragraph 5 of article 24, "Entry, transit and sojourn in the host country".

Article 23, paragraph 1

19. Several delegations agreed with the drafting of paragraph 1.

20. However, other delegations were of the view that the footnote 1/ contained in article 18 of the revised draft Protocol on privileges and immunities (LOS/PCN/SCN.4/WP.6/Rev.1) should be reproduced under article 23.

21. One delegation was not in favour of such suggestion because it went against the agreed assumption that the Tribunal was to be independent from other international organizations.

22. It was argued that the proposal was in line with the idea that the Tribunal should enter into relationship arrangements with the United Nations and benefit from them. Moreover, that way, there would not be proliferation of travel documents.

23. In the end it was accepted to keep paragraph 1 as it stood with the footnote from article 18 of document LOS/PCN/SCN.4/WP.6/Rev.1.

24. Delegations accepted the rest of the article with the agreement that, with regard to paragraph 2 and in the case of stateless persons, a line would be added dealing with their situation.

II. PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

A. LOS/PCN/SCN.4/WP.6

25. In discussing article 14 entitled "Laissez-passer", delegations expressed several views.

Paragraph 1

26. One delegation was of the view that taking into account previous discussions on the same issue, 2/ and for obvious practical reasons, the Tribunal should be permitted to use the United Nations laissez-passer instead of a separate one. He called the attention of the Commission to the draft headquarters agreement regarding the Seabed Authority, which in its article 37 provide for such ability.

27. The Secretary pointed out that the article had been drafted on the basis that the Tribunal would issue its own laissez-passer but, in the event that there was an appropriate relationship arrangement with the United Nations, then that agreement could provide for the use of the United Nations laissez-passer.

Paragraph 2

28. Several delegations were of the view that paragraph 2 of article 14 was not necessary, if not redundant, because it referred to a situation already taken care of in articles 8 and 11 of the document. Therefore it was suggested to delete it.

29. But several other delegations were against the deletion, because they argued that the situation portrayed in the above articles were in fact different from what was intended in article 14. Paragraph 2 of article 14 was concerned mainly with the issue related to the laissez-passer and what facilities it would accord to the users.

30. The Secretary explained that paragraph 1 dealt with the recognition of the standard laissez-passer as a valid travel document. Paragraph 2 referred to the situation where the users of the laissez-passer already enjoyed privileges and immunities by their status as diplomats, as enjoyed by the Registrar, or in the case of the United Nations, the Secretary-General. In the first case (para. 1), the laissez-passer did not carry privileges and immunities but only facilitated travel. In the second case, (para. 2), the carrying of a laissez-passer entailed requirements regarding diplomatic privileges and immunities.

31. Different suggestions were put forward to redraft paragraph 2. One delegation suggested insertion of a qualification to the laissez-passer which would say: "... travelling on diplomatic laissez-passer ...". Another delegation suggested that paragraph 2 be deleted and paragraph 1 be redrafted as follows: "The Tribunal may issue two laisser-passer, a diplomatic one to the members of the Tribunal and a regular one to the officials". Another suggestion was to redraft paragraph 2 as follows: "... Laissez-passer issued to the members of the Tribunal will reflect privileges, immunities and facilities granted to them under ...".

32. In the end, it was agreed that the Secretariat should draft a compromise, a new article 14 which would take into consideration the views expressed on paragraph 2, in particular.

Paragraph 3

33. One delegation was of the view that paragraph 3 should be more condensed. He suggested to say only the following: "Applications for visas, where required, for members of the Tribunal and the Registrar, ... shall be dealt with as speedily as possible". He also suggested that the drafting should be in a form of a recommendation rather than in mandatory language. However, his delegation was of the view that the last two sentences of the paragraph were not necessary; the situations referred to were not under any country's control.

34. As a drafting matter, another delegation suggested that the word "expeditiously" be used instead of "speedily".

B. LOS/PCN/SCN.4/WP.6/Rev.1

35. The issue of the use of the United Nations *laissez-passer* was considered again in examining the revised document on the Privileges and Immunities, (LOS/PCN/SCN.4/WP.6/Rev.1). During the deliberations on article 18, delegations showed a certain reluctance to accept the article as it stood.

36. It was argued that the article did not respect the independent character of the Tribunal, while another delegation questioned the necessity to issue so many *laissez-passer*.

37. In the end it was agreed to delete paragraph 2 of article 18 as being unnecessary since the situation was already dealt with in article 10 of the Protocol.

38. Paragraph 3 would remain but be merged with paragraph 4, since both dealt with the issuance of visas.

III. "DRAFT AGREEMENT ON COOPERATION AND RELATIONSHIPS BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA" (LOS/PCN/SCN.4/WP.9)

39. The issue of the use of *laissez-passer* was also considered when examining the document on cooperation and relationships between the United Nations and the Tribunal.

40. Article 14 entitled "*Laissez-passer*" had been drawn up in similitude to article 17 governing the practice of the World Intellectual Property Organization (WIPO). It was drafted as follows:

> "Members of the International Tribunal, the Registrar and other officials of the International Tribunal and the Registry shall be entitled, in accordance with such special arrangements as may be concluded between the Secretary-General of the United Nations and the Registrar of the International Tribunal, to use the *laissez-passer* of the United Nations."

41. In introducing it, the Secretary stated that the article dealt with the use of the United Nations *laissez-passer* by the officials of the Tribunal. The Secretariat took into consideration the discussions on privileges and immunities held in relation with the Headquarters Agreement when drafting this article.

42. Some delegations pointed out that the article again raised the problem of the independence of the Tribunal. Clarifications were sought as to the implications of the phrase "special arrangements". Those delegations also questioned the ability of the General Assembly, without imposing new requirements or expenses on its Member States, to actually extend all the rights and obligations attached to the *laissez-passer* to the members and officials of the Tribunal.

43. The Secretary explained that should the Tribunal decide to use the *laissez-passer* of the United Nations some practical arrangements would have to be made between the United Nations and the Tribunal.

44. Some other delegations were of the view that the *laisser-passer* of the United Nations should be used by the Tribunal and that the article as formulated should be retained.

45. It was pointed out by the Secretary that there was a general practice favouring the use of the United Nations *laissez-passer*.

46. At the end, the issue of the use of the United Nations *laissez-passer* was not resolved by the Commission. But delegations could refer to the different documents dealing with the question. 3/ In that regard, it was requested that the different articles on the same issue be harmonized.

47. Since the present document is a summary of discussions, it is not possible to reflect each and every intervention fully or reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions and these will be taken into account when redrafting the document. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being informed.

Notes

1/ The footnote states that: "In the event that arrangements are entered into with the United Nations for the issuance of the *laissez-passer* of the United Nations, then the Tribunal may not need to issue its own *laissez-passer*".

2/ See Chairman's summary of discussions (LOS/PCN/SCN.4/L.11/Add.2) and the deliberations on article 23 of document LCS/PCN/SCN.4/WP.5/Rev.1 and Corr.1.

3/ See documents LOS/PCN/SCN.4/WP.16/Add.2; LOS/PCN/SCN.4/WP.16/Add.3; LOS/PCN/SCN.4/WP.16/Add.4; LOS/PCN/SCN.4/L.11/Add.1 and Add.2; LOS/PCN/SCN.4/L.13/Add.1 and Add.2; LOS/PCN/SCN.4/L.15.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY AND
THE INTERNATIONAL TRIBUNAL FOR THE
LAW OF THE SEA
Special Commission 4

CHAIRMAN'S SUMMARY OF DISCUSSIONS

Draft report of the Preparatory Commission under paragraph 10 of resolution I containing recommendations regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.15)

1. During the spring meetings of the eleventh session of the Preparatory Commission, Special Commission 4 began and concluded the consideration of the "Draft report of the Preparatory Commission under paragraph 10 of resolution I containing recommendations regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea" (LOS/PCN/SCN.4/WP.15).

2. It was generally agreed that the report was not a negotiating text but a factual record of what had taken place over the last 11 years, what had been achieved and what was still pending. Therefore it was decided that general observations should be made first and that, if delegations wished to do so, they could give their remarks in writing and these would be then attached to the report. Also, specific observations should aim to correct inaccuracies in the record. The aim was to enable the Commission to make progress during the short two-week session.

Introduction of the working paper

3. In introducing the working paper, the Secretary stated that the Commission had before it the draft report to be submitted to the meeting of States Parties under paragraph 10 of resolution I (LOS/PCN/SCN.4/WP.15). He also stated that the document was a revised version of document LOS/PCN/SCN.4/WP.14, entitled "Draft outline for the report of the Preparatory Commission containing recommendations regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea". He pointed out that working

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paper 15 took into account comments submitted by the European Community and its member States on working paper 14 (LOS/PCN/SCN.4/1993/CRP.47).

4. With regard to the structure of working paper 15, the Secretary pointed out that the report followed the important precedent of the 1946 report of the Preparatory Commission for the United Nations; it had been construed around the phrase "the Preparatory Commission recommends ..." It also contained two annexes: a list of addenda and a list of documents and Plenary documents of special relevance to Special Commission 4. He also stated that the working paper had a complete table of contents, intended to facilitate easy appreciation.

5. Introducing the changes to the working paper, the Secretary called the attention of delegations to the new title which had been harmonized with the titles of the other reports of the Preparatory Commission. However, owing to the special status of the Tribunal in the Convention, which provided for the creation of Special Commission 4 for the establishment of the International Tribunal for the Law of the Sea, a particular reference to the Convention and paragraph 10 of resolution I (not paragraph 11 as referred to in the other reports) had been introduced into the title. He also pointed out that the word "draft" in the title had been used to respect the understanding that the meeting of States Parties would be the ultimate forum to adopt the report.

General comments

6. Some delegations were of the view that the report contained too many references to documents that were not reproduced in the report. It was suggested that the report should be drafted in a sufficiently detailed manner so as to give a summary of any document referred to throughout the text. One delegation also suggested that such summaries should appear as footnotes to the text.

7. It was argued that the implementation of the above proposal would compromise the form of the report and render it too voluminous for its purpose. Nevertheless, with regard to the issue of the drafting, it was generally agreed that the other language versions would be harmonized with the original as necessary and wherever this was referred to in the deliberations.

8. The question of the accuracy of the wording used throughout the report was also discussed. It was agreed that it was necessary to respect, in the use of words, and of verbs in particular, what had transpired in the Special Commission.

9. One delegation inquired about the non-availability of some of the addenda when examining the report. It was generally agreed that delegations would be sent the addenda as soon as possible, and that their comments to the addenda and/or to the text of the report itself would be attached to the report.

10. Still on procedural matters, one delegation also stated that although the Chairman had said that the report was not a negotiating document, his delegation was unaware of any provision that would prohibit the Commission from taking action on a substantial change if it so decided.

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The title

11. Some delegations suggested that the title should reflect more clearly that the report emanated from Special Commission 4. It was generally agreed that the title of the report would be placed within parentheses and preceded by the wording "Provisional report of Special Commission 4".

12. Other delegations wondered why the title referred to paragraph 10 of resolution I while the other Preparatory Commission reports referred to paragraph 11. It was understood that the provisions of paragraph 11 did not apply to the establishment of the International Tribunal for the Law of the Sea and therefore to Special Commission 4. However, paragraph 10, in comparison, provided for a report "regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea" to be submitted to the meeting of the States Parties. It was concluded that this meant that there would be two final reports of the Preparatory Commission: one "final" report under paragraph 11 and the matters dealt with by the Plenary and Special Commissions 1, 2 and 3, and "a report" on Special Commission 4 matters. Therefore, it was considered appropriate by several delegations to reproduce the whole title as found in paragraph 10 in order to avoid any confusion and to be legally correct in accordance with the 1982 Convention on the Law of the Sea. This statement was also made in response to the preoccupation of one delegation about the seemingly restrictive meaning of the word "practical arrangements" in the title as well as to the wording "draft Report" instead of "final draft Report" as found in the other Preparatory Commission reports.

Introductory note

13. Several delegations suggested that the introductory note be redrafted so as to avoid the same confusion as found previously in the title. One delegation in particular pointed out that paragraphs 2 and 4 of the introductory note had to be put in line with paragraph 10 of resolution I.

14. Another delegation suggested that the introductory note should clearly mention that the report reflected the result of the work of Special Commission 4.

15. Other delegations were of the view that the status of pending issues should also be reflected in the introductory note. To that end, one delegation from the Group of 77 suggested that there should be an index of the different programmes of work that would state what matters had been discussed and which of them had been resolved, and that would clearly identify the outstanding issues. Another delegation suggested that the introductory note should contain one or two paragraphs that would state that some issues had not been successfully discussed and should be raised again at an appropriate time. There would also be a reference to a list of pending issues. On the status of pending issues, he suggested adopting mutatis mutandis the same wording as in the relevant paragraph of the report of the Plenary (LOS/PCN/WP.52).

16. At the end, it was generally agreed that the Secretariat would redraft the introductory note taking into consideration the Commission's views and in particular, the need to clearly identify the report as emanating from Special

Commission 4, as well as the request to insert one or two paragraphs referring to a list of pending issues.

17. There were no comments on the Introduction.

Chapter I. JUDICIAL PROCEDURE

Section I. Recommendations concerning the draft Rules of the Tribunal

18. Two suggestions were made in order for redrafting the recommendation in section I. One delegation pointed out that the word "approved" used in the first sentence did not correspond to the fact that the Commission was only giving a recommendation to the Tribunal. The word "formulated" was then suggested and generally approved by delegations. Therefore the first sentence of the recommendation would read as follows:

> "The PREPARATORY COMMISSION recommends that:
>
> > "the final draft Rules of the Tribunal formulated by the Commission ..."

19. Along the same lines, another delegation suggested replacing the words "for the adoption" by "for the determination".

20. At the end, this suggestion was not approved, but the Secretariat was nevertheless invited to redraft the recommendation using a less definitive wording.

Section 2. Composition of the Tribunal and its chambers

21. In order to respect the wording used by the Convention in its Annex VI on the Tribunal, one delegation suggested inserting the word "equitable" in the first sentence of the paragraph so that it would read as follows:

> "In connection with the equitable geographical distribution ..."

22. The suggestion was supported by the Commission.

Section 3. Official working languages

23. One delegation from a regional group drew attention to the question of official languages and insisted that the following should be stated in this section: "No agreement was reached among delegations regarding the official working languages of the Tribunal."

24. Although the same idea was later reflected in chapter IV, section I, of the report, in the end the above suggestion was generally agreed upon and the new sentence was inserted at the end of the paragraph.

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Section 4. Harmonization of jurisprudence

Section 5. Internal judicial practice

Section 6. Access by States not parties to the Convention

25. It was generally agreed that the three sections would be retained as they stood.

26. The Commission considered that it had finished the examination of chapter I, with the amendments agreed upon.

Chapter II. INTERNATIONAL AGREEMENTS

27. Several delegations raised questions about the wording used in some paragraphs and requested confirmation of their meaning so as to avoid any confusion. At issue was the use of the words "facilitates" in "... the Meeting of States Parties facilitates the Tribunal ..." (sect. 1, first para., second and third lines) and "adherence" in "... for adoption and adherence by all States" (sect. 2, last line of the recommendation). Some harmonization was also requested with regard to the French version.

Section 1. Recommendations concerning the draft Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany

28. One delegation from the Group of 77 was of the view that it was necessary to reflect in the report the obligations of the host country with regard to its becoming a Party to the Convention. His delegation therefore suggested the insertion of a footnote referring to paragraph 38 of the Final Act of the Convention, similar to the one found in document LOS/PCN/SCN.4/WP.15/Add.2. Another representative stated that although his delegation did not oppose that suggestion, he wanted to reiterate that his delegation wished for a universal acceptance of the Convention so that such a reference would become unnecessary. He suggested inserting the text of the footnote within square brackets.

29. In the end, it was generally agreed that the above reference to the Final Act would appear only in a footnote and not the text proper.

Section 2. Recommendations concerning the Draft Protocol on the Privileges and Immunities of the Tribunal

30. One delegation suggested redrafting the recommendation in order to harmonize it with the preceding ones. Some proposals were given. The new draft as suggested was as follows:

"Therefore

"THE PREPARATORY COMMISSION recommends _that_:

> the final draft Protocol ..., _formulated_ by the Commission ..., addendum 3 hereto, _should provide the basis for negotiating and entering into such a Protocol_."

31. It was generally agreed to redraft the recommendation as suggested above.

32. The question of wording was raised again under the section. The word "approved" in "... was considered and approved ..." (third paragraph after the recommendation, penultimate line) was considered too strong a word.

33. It was suggested and generally agreed to replace it by "formulated".

34. Since the action referred to in paragraph 5 was obsolete because it had already been accomplished, and also since the Secretariat did not have any mandate to meet before the meeting of States Parties, it was suggested and agreed to delete altogether the fourth paragraph after the recommendation.

Section 3. Use of the United Nations laissez-passer by the Tribunal

35. In introducing the section, the Secretary pointed out that the section could also be moved under chapter III because it involved a relationship arrangement between two organizations (the United Nations and the Tribunal) rather than an original international agreement _stricto sensu_.

36. Several delegations supported the proposal and it was suggested, since it was no longer necessary, to delete the last sentence of the paragraph, which read: "The relevant issue may be dealt with in the context of chapter III; section 1 below."

37. Therefore it was generally agreed to move section 3 under chapter III as a new section 2, with the understanding that the last sentence of the paragraph would be deleted and the sections under chapter III renumbered accordingly.

Chapter III. RELATIONSHIP ARRANGEMENTS

Section 1. Recommendations concerning relationship arrangements between the United Nations and the International Tribunal for the Law of the Sea

38. One delegation pointed out that the first paragraph of the section had been drafted in a confusing manner. He suggested a new drafting that would emphasize that the Commission wished for an effective relationship between the Tribunal and the United Nations. The new draft (submitted originally in French) was as follows: "In order to enable the International Tribunal for the Law of the Sea and the United Nations to have and develop a relationship of effective

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cooperation, thereby facilitating the objectives of the Tribunal and the United Nations, it is ..."

39. This proposal was generally supported by the Commission.

40. Other delegations raised drafting points. It was suggested and generally agreed to modify the recommendation, in order to give the complete name of the agreement i.e., "Final draft Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea". Also, it was agreed that the last sentence in the second paragraph after the recommendation should read: "The final draft Relationship Agreement between the United Nations and the International Tribunal for the Law of the Sea was formulated by the Secretariat ..." (inclusion of the verb)

41. With regard to the different language versions, one delegation pointed out a misleading error in the French version of the same paragraph. It was suggested and generally agreed to reformulate the last sentence as follows:

> "Le Secretariat a établi le texte final du projet d'accord (...) en tenant dûment compte des vues exprimées à la Commission touchant la nécessité de réduire au maximum les dépenses de mise en place (...)".

Section 2. Relationship arrangement between the International Tribunal for the Law of the Sea and the International Seabed Authority

42. One delegation argued that the form of the section, and particularly the recommendation, was not in harmony with the rest of the report. He suggested using the verb "recommends" instead of "submits" since the form of the text suggested a recommendation. The Secretary pointed out that the issue concerned was one left unresolved throughout the discussions and therefore was left for the consideration of the meeting of States parties; hence the neutral formulation.

43. As a compromise, it was suggested to delete the last part of the sentence of the paragraph which read: "... as a basis for the deliberations of the meeting of States Parties."

44. In the end, the deletion was generally agreed upon by the Commission.

Section 3. Supplementary arrangements between the International Tribunal for the Law of the Sea and the International Court of Justice

45. One delegation argued that the content of the section did not correspond to the title since the Commission could not and was not empowered to take any decision as to the relationship between the International Court of Justice and the International Tribunal for the Law of the Sea. He suggested deleting altogether the section, leaving the door open for any future arrangements. Other delegations, however, were of the view that although no decision was taken

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by the Commission on the matter, in the context of a factual report it was worth mentioning that the issue had nevertheless been taken up by the Commission.

46. A compromise suggestion to redraft the section was put forth by one delegation, as follows: "Consequent upon the communication of the Registrar of the International Court of Justice, the Special Commission decided that it would not be appropriate for it to consider such relationship arrangements." The rest of the sentence would then be deleted.

47. In the end, it was generally agreed to accept the above proposal for a redrafted section 3.

Chapter IV. ADMINISTRATIVE ARRANGEMENTS

Section 1. Recommendations concerning administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea

and

Recommendations concerning the scheme for the initial phasing-in of the establishment of the International Tribunal for the Law of the Sea

48. One delegation was of the view that with regard to the unresolved languages issue, the paragraph following the recommendation was too decisive. He suggested deleting the text from: "and taking into account" to "or advisory opinion".

49. Several other suggestions were made with regard to the matter. In the end it was generally decided not to make the suggested deletion but instead to insert the words "one or six" before "official working languages" (tenth line of the same paragraph).

50. On a drafting matter, one delegation suggested that since the document was a Preparatory Commission draft report it was necessary to reformulate, wherever required, the sentences containing reference to the role of the Secretariat. Therefore, in the second paragraph following the recommendation, he suggested that in the first line the words "that the Secretariat" be deleted and replaced by the word "to". The same change would be made in sections 2 and 3.

51. The Commission generally favoured the suggested drafting changes.

52. With regard to the third paragraph following the recommendation, one delegation suggested deleting as inadequate the word "interested" (fourth line). Another delegation pointed out that Czechoslovakia and Tunisia had joined the other sponsors of the relevant proposal as now referred to in document LOS/PCN/SCN.4/WP.13/Corr.1. He requested the new information to be reflected consequently in the report. It was also suggested to add at the end of the same paragraph the same sentence as appeared in chapter I, section 3, with regard to

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the official working languages: "No agreement was reached among delegations regarding the official working languages of the Tribunal."

53. The Commission generally agreed to the deletion of the word "interested" and to the insertion of a reference to document LOS/PCN/SCN.4/WP.13/Corr.1 and the additional co-sponsors of the proposal. It was also generally agreed to add the new sentence at the end of the paragraph, as mentioned above.

Section 2. Recommendations concerning the draft financial rules and staff regulation

54. One delegation pointed out that the section did not comprise a recommendation. Therefore, he suggested deleting in the title of the section the words "Recommendations concerning the". The title would then read: "Draft financial rules and staff regulations". The same remark was made in regard to section 3, whose title would then read: "The initial financing and budget of the International Tribunal for the Law of the Sea."

55. Both changes were generally favoured by the Commission.

Section 3. Recommendations concerning the initial financing and budget of the International Tribunal for the Law of the Sea

56. One delegation suggested that the English text be harmonized more accurately with the French text and that in the paragraph beginning "The Preparatory Commission submits:", the English word "recommendations" be replaced by the word "proposals". The same change would apply in the third sentence of the following paragraph.

57. Another delegation suggested adding the following words in the same paragraph: after "formulate" (third sentence), the words "for the Meeting of States Parties".

58. It was understood that the above proposal would also entail the deletion, in the preceding paragraph, of the words "to provide a basis".

59. The Commission generally agreed to make the above addition and consequent deletion.

Chapter V. THE PERMANENT HEADQUARTERS OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

60. There were no comments on section 1, which therefore was generally agreed upon by the Commission as it stood.

Section 2. Recommendations concerning the building requirements and facilities of the International Tribunal for the Law of the Sea provided by the host country

and

Section 3. Recommendations concerning the requirements and facilities necessary to supplement those provided by the host country

61. The only comments made concerning these two sections were of a drafting nature. One delegation pointed out that the word "building" was missing both in the French title of section 2 and in the English title of section 3. Another delegation was of the view that it would be more logical for the enumeration of furniture and equipment intended to be provided by the host country, which was currently under section 3, to appear instead at the end of section 2.

62. In the end, it was generally agreed to make the above changes *i.e.*, to harmonize both titles and in all language versions and to make the consequential cross-references that would result from the rearrangement of sections.

63. No comments were made with regard to chapter VI.

64. At the end, the Commission noted that it had concluded the consideration of its report.

65. With regard to the annexes, one delegation from the Group of 77 pointed out that in annex II some documents of particular relevance to Special Commission 4 were not listed. He drew especial attention to document LOS/PCN/85 of 28 April 1987 and suggested that it be inserted. Another delegation supported his comment and suggested that at a later stage a list should be provided of the missing documents to be included.

66. Since the present document is a summary of discussions, it is not possible to reflect each and every intervention fully or to reproduce suggested formulations. The Secretariat has maintained a complete record of all suggestions, and these will be taken into account when redrafting the document. Should any representative feel that an important matter has been omitted, the Chairman would appreciate being informed.

LOS/PCN/SCN.4/1984/CRP.1/Rev.
29 March 1984

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Second Session

Agenda for Special Commission 4*

1. Adoption of the agenda
2. Organization of work
3. Consideration of the subject-matter referred to in paragraph 10 of resolution I of the Third United Nations Conference on the Law of the Sea
4. Other matters

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*Adopted at the Second Meeting of Special Commission 4 on 22 March 1984.

LOS/PCN/SCN 4/1984/CRP.2

ORIGINAL: ENGLISH

March 27, 1984.

SUGGESTIONS OF THE BUREAU

1. At its second meeting the Special Commission decided to start its substantive work with the consideration of the procedural rules of the Tribunal (Item VIII in the Working Paper prepared by the Secretariat, LOS/PCN/SCN 4/WP.1).

2. In general, it would appear that the practice of the International Court of Justice could be followed in drafting procedural rules. However, there are certain items in respect of which there is either no clear precedent or the practice of the International Court is not wholly appropriate. The review of these items would provide for initial guidelines for the preparation of draft rules. Therefore it is proposed by the Chairman and the Bureau that the deliberation should start with the following:

(a) The composition of, and the procedure to be applied in the Sea-bed Disputes Chamber, its ad hoc Chamber, the Chambers of the Tribunal and its Summary Procedure Chamber;

(b) The access to the Tribunal or its Chambers of entities other than States such as: (i) natural and juridical persons; (ii) international organizations, especially the Authority and its Enterprise; (iii) international intergovernmental organizations constituted by States which have competence to deal with matters governed by the Convention on behalf of Member States of the organization, as provided in Article 305.1(f) and annex IX of the Convention and,

(c) The manner in which requests for advisory opinions are to be submitted to the Sea-bed Disputes Chamber under Article 159.10 by the Authority.

3. As regards item (c), namely advisory opinions, while a preliminary examination may be conducted at this stage, the final resolution of that issue would have to be dealt concurrently with the consideration of this question by the Preparatory Commission in Plenary.

4. Before turning to these specific items delegations would be free to address any issues of a general nature that should be taken into account in preparing the draft rules.

5. To remain flexible in the organisation of work, when the consideration of these items has been concluded, a decision can be taken as to what items are to be taken up next.

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LOS/PCN/SCN.4/1984/CRP.3
28 March 1984

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Second session

EXTRACT FROM STATEMENT BY THE CHAIRMAN

A. The composition of the Tribunal and its chambers

1. The structure consists of the Tribunal itself, the chambers established by it for dealing with particular categories of disputes /Statute article 15.1/; the chambers established ad hoc at the request of parties to a particular dispute (article 15.2) the Chamber for Summary Procedure (article 15.3), the Sea Bed Disputes Chamber (articles 14 and 35) and ad hoc chambers of the Sea-Bed Disputes Chamber (article 36). To elaborate on this structure:

(i) The different aspects of equitable geographical distribution and representation of the principal legal systems within the Tribunal and its chambers need to be examined,

(ii) Considerations should be given as to what officials are needed for the Tribunal and its chambers, and

(iii) The manner in which the Chambers are elected or selected as the case may be, and the procedures to guide such selection or election would also have to be examined.

2. In dealing with the specifics I would draw attention to several aspects of the structure and organization of the chambers which is extremely complex. The Secretariat Working Paper LOS/PCN/SCN.4/WP.1, paragraph 23, lists the different items concerning the composition of the Tribunal that need to be elaborated in the Draft Rules of Procedure. In paragraph 23, Working Paper 1 lists as Item 1: the composition of the Tribunal, Item 5: the composition of the chambers, and Item 6: sittings and deliberations. For many of these items we can draw from the precedent in the Rules of the ICJ, yet there are other items which need examination.

3. In elaborating the structural framework a variety of considerations have to be taken into account, given the need for an efficient and effective disputes settlement forum with jurisdiction over all aspects of the Convention and with the special role of the Sea-Bed Disputes Chamber. A preliminary examination would thus be called for before any attempt can be made to formulate draft rules.

Representation and distribution

4. In considering these aspects, attention is drawn to the following factors.

(i) In the Tribunal, equitable geographical distribution is to be assured and also representation of the principal legal systems /articles 2 and 3 of the Statute/. While article 3.2 of the Statute establishes a minimum of 3 members for each of the geographical groups established by the United Nations General Assembly, the question arises as to how the additional 6 members to make up a body of 21 members would be distributed. Should such distribution represent the initial composition of the States Parties to the Convention when it first enters into force or would the understandings of the United Nations General Assembly be applied on the basis of its membership?

(ii) from the number of 21 members of the Tribunal, 11 are to be selected to serve as members of the Sea-Bed Disputes Chamber (article 14 and 36 of the Statute). In selecting these 11 members, again equitable geographical distribution and representation of the principal legal systems is required. This raises the question as to how the secondary apportionment of members would be made.

(iii) the Tribunal is also to form chambers of three or more members to deal with particular categories of disputes (article 15, para. 1). These would be standing chambers. In the absence of any indication in the Statute, the need for geographic distribution and representation of the legal systems in these chambers would have to be considered.

(iv) the Tribunal also has to form annually, a Chamber of Summary Procedure consisting of five members with two alternates for the speedy dispatch of its business. Here again the question of appropriate representation has to be examined.

5. No problem would be raised as regards the ad hoc chambers of the Tribunal (as contemplated in article 15.2 of the Statute), or the ad hoc chambers of the Sea-Bed Disputes Chamber (as contemplated in article 36 of the Statute). In both of these cases, there is no need for regional distribution or representation of the legal systems.

6. In determining the composition of the various chambers it is to be noted that out of the total membership of 21, 11 constitute the Sea-Bed Disputes Chamber and 7 are required for the Summary Procedure Chamber. This leaves three members free for the chambers dealing with particular categories of dispute.

/...

The question therefore is whether representation of both kinds can be assured in any of the chambers other than in the Sea-Bed Disputes Chamber.

7. In determining how the Sea-Bed Disputes Chamber would be constituted article 35, paragraph 2 gives the Assembly the right to adopt recommendations of a general nature relating to representation and distribution of the members. There would have to be a corresponding provision in the rules regulations and procedures of the Assembly to elaborate on this power.

8. It is thus seen that the question of distribution and representation cannot be readily solved by merely looking at precedent.

Officials and precedence

9. On the question of officials and the precedence between them there are distinctions between the practice of the International Court of Justice and that of the European Communities Court. The questions to be resolved for the Tribunal include the following:

(i) The Statute of the Tribunal for the Law of the Sea provides for a President of the Tribunal and a President of the Sea-Bed Disputes Chamber. The question then is whether the Tribunal should also have a Vice President? Should there be an order of seniority for the Tribunal as a whole, and a separate order of seniority for the Sea Bed Disputes Chamber? Would the President of the Sea-Bed Disputes Chamber be next in seniority or next in precedence to the President of the Tribunal?

(ii) The ICJ has a President and a Vice-President. The President and Vice-President function as such in its Chamber of Summary Procedure. In the other chambers, the procedure is different (refer ICJ rule 18). In these cases each chamber elects its own President and Vice-President unless the President or Vice President of the Court is a member of the chamber. In the case of the European Communities Court the President of the Chamber substitutes for the President of the Court in his absence. There is no Vice-President. While some of this precedent is obviously inapplicable in the case of the SBDC and other chambers, the degree to which this practice could be followed has to be reviewed.

(iii) The precedence of the members of the International Court of Justice is followed in the Statute of the Tribunal as regards the Tribunal as a whole. That is, that the seniority follows the date of election. As between members elected on the same date, the age of the member concerned is applied to seniority. The question arises as to whether this should be followed in the chambers also.

/...

Nomination and elections or selections

10. The Statute of the Tribunal provides guidance as to the manner of the first election and of subsequent elections of members of the Tribunal (articles 4 and 5). However, the manner of selection of the members of the SBDC is not so categoric. Of particular significance in this context are the following:

(i) the fact that the members of the SBDC are selected rather than elected, but there is no explanation as to how this selection procedure is carried out.

(ii) a particularly relevant consideration is that the Assembly of the Authority may make recommendations of a general nature on the questions of representation and distribution.

(iii) the conscious use of the word "select" rather than "elect" must mean that the members of the Tribunal have to adopt a procedure that does not involve expressions of preference or voting.

11. The answer may possibly lie in some kind of consensus procedure based on willingness of members to serve on the SBDC in their areas of expertise. There could also be understandings as to rotations or replacement periodically according to an agreed pattern depending on the terms of office under the initial elections.

12. The Special Commission would have to review these aspects of election given the overall needs of the Tribunal, taking account of specific needs of the Sea-Bed Disputes Chamber and bearing in mind the needs of the other chambers that are to be established.

LOS/PCN/SCN.4/1984/CRP.3/Corr.
30 March 1984

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Second Session

EXTRACT FROM STATEMENT BY THE CHAIRMAN

Corrigendum

1. Page 3, paragraph 9, subparagraph (i)

First two sentences should read (1) The Statute of the Tribunal for the Law of the Sea provides for a President and a Vice President of the Tribunal and a President of the Sea-Bed Disputes Chamber. The question then is whether the Sea-Bed Disputes Chamber should also have a Vice President?

2. Page 3, paragraph 9, subparagraph (iii), line 3

After sentence ending ... as a whole. insert This is elaborated in the Rules of Court (Rule 3)

3. Page 3, paragraph 9, subparagraph (iii), line 6

After followed insert in the Tribunal and

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LOS/PCN/SCN.4/1984/CRP.4
4 April 1984

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Second session

STATEMENT BY THE CHAIRMAN

Access by entities other than States

1. We can enter into a preliminary exchange of opinions on the conditions of access by entities other than States.

2. I already pointed out in my statement of 28 March that the terms, conditions and procedures under which States Parties to the Convention would have access to the Tribunal and its chambers could follow the well established practices of the International Court of Justice. However, special consideration would have to be given to procedures to be applied to access by other entities.

3. Although the Tribunal's Statute refers to "access" the Statute of the International Court of Justice does not do so. However, the issue is well known and is provided for in the International Court's Statute and Rules. In the case of the International Court, only States have the right to be parties to a dispute. Similarly, in the case of the Tribunal only States Parties have the right of access in matters relating to the interpretation or application of the Convention. This would include international organizations referred to in Annex IX in cases within their spheres of competence. In enjoying that right, intergovernmental organizations do so on behalf of and in the place of their Member States. Other entities only have the right of access to the Sea-Bed Disputes Chamber. Their access is also limited to certain kinds of disputes.

4. Article 20 of the Tribunal's Statute (Annex VI) refers to the question of access to the Tribunal by States Parties (para. 1) and to other entities where Part XI so provides or pursuant to an agreement (para. 2).

/...

5. Article 37 deals with the access of entities to the Sea-Bed Disputes Chamber. Under that article States Parties, the Authority and other entities referred to in Part XI have access to the Chamber. Relevant in this context is article 187 of Part XI which spells out the different entities that have access to the Chamber with regard to different categories of dispute.

Intergovernmental organizations provided for in Annex IX

6. With regard to access to the Tribunal and its chambers by intergovernmental organizations as provided for in Annex IX of the Convention, numerous specific questions arise which must be answered in the rules of procedure for the Tribunal. In view of the brevity of the time at our disposal for the consideration of these problems we should confine our discussions to the principal issues. Therefore I merely wish to point to some of the main questions involved:

(a) When a dispute is submitted to the Tribunal, and one or more intergovernmental organizations are parties, under what circumstances should the Tribunal examine *proprio motu* whether such intergovernmental organization or organizations have competence in respect of the specific matter at issue between the parties to that dispute? and under what circumstances should such competence of an intergovernmental organization party to a dispute be examined? Should it be only if the other party to the dispute challenges such competence of the intergovernmental organization?

(b) What would be the manner of application of article 17 of the Statute of the Tribunal which refers to members of the nationality of the parties to the dispute being included among the members in any particular case, in connection with access to the Tribunal and its chambers by intergovernmental organizations.

(c) In what way should the rules of procedure for the Tribunal provide for a case where several members of the Tribunal possess the nationality of member States of any intergovernmental organization that is a party to a dispute before the Tribunal? In such a case should only one of the members of the Tribunal possessing the nationality of one of the member States of the intergovernmental organization concerned have the right to sit in the particular case? If so, it could be that fewer members than are required for a quorum remain available for the Tribunal and in particular for the Sea-Bed Disputes Chamber or the special chambers.

7. In regard to the participation of intergovernmental organizations in proceedings of the Tribunal and its chambers the rules of procedure for the Tribunal should provide such solutions as ensure, on the one hand, fair and equal treatment of all parties to a given dispute,

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and, on the other hand, the highest possible standard of efficiency and effectiveness in the proceedings.

The Authority and the Enterprise, natural and juridical persons

8. The access of the Authority and its Enterprise and of natural or juridical persons to the Sea-Bed Disputes Chamber are separate issues which also need review. As I already mentioned in my statement of 28 March, the procedures that have to be formulated for these purposes entail questions such as.

(a) Disputes between the different entities referred to in article 187 which may be parties to a contract, being States Parties, the Authority or the Enterprise, State Enterprises and natural or juridical persons (article 187 (c)),

(b) Disputes concerning alleged violations of the Convention by the Authority or its acts that are alleged to be in excess of jurisdiction or a misuse of power (article 187 (b))

(c) Disputes between prospective contractors and the Authority (article 187 (d)), and

(d) The substitution of juridical persons as respondents in the place of sponsoring States in a case submitted by a natural or juridical person under article 190.

9. The rules of procedure for the Tribunal must prescribe what documentation is required to be furnished by natural and juridical persons along with their application when submitting a dispute to the Sea-Bed Disputes Chamber. The rules of the Court of Justice of the European Communities provide, for instance, that an application by a juridical person governed by private law shall be accompanied by its statutes (the instrument or instruments constituting and regulating that juridical person) as well as by proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose. We need to consider whether the rules of the Tribunal should contain similar provisions.

Characteristics of nationality

10. Article 17 of the Statute of the Tribunal deals with the appointment of nationals of the Parties to the dispute as members of the Tribunal in any particular case. This would also apply to the Sea-Bed Disputes Chamber by virtue of article 40, paragraph 1.

/...

Questions that arise in this context are.

(a) By what criteria is a determination made as to the nationality of international consortia which become parties to a dispute before the Sea-Bed Disputes Chamber, and whose components, being natural or juridical persons, possess the nationality of two or more States?

(b) Similarly, how is a determination made as to the nationality of members of the Tribunal, the Sea-Bed Disputes Chamber and the special chambers for the purpose of implementing article 17 of the statute in cases which involve other entities such as.

(i) International organizations within the meaning of Annex IX.

(ii) Juridical persons, bearing in mind that they may be in the form of multinational corporations or international consortia;

(iii) The Authority.

(iv) The Enterprise?

Other intergovernmental organizations

11. Another issue we should consider is the competence of the Tribunal in requesting relevant information from competent international organizations. There is special provision in the ICJ Statute (article 34), that permits the Court to do so.

LOS/PCN/SCN.4/1984/CRP.5
10 April 1984

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Second session

STATEMENT BY THE CHAIRMAN ON THE QUESTION OF ADVISORY OPINIONS

In the course of the Third Meeting of our Special Commission on 28 March we agreed that upon conclusion of the discussion of access by entities other than States we should take up the question of advisory opinions which the Sea-Bed Disputes Chamber is called upon to render at the request of the Assembly or of the Council of the Sea-Bed Authority under articles 159(10) and 191 of the Convention.

The provisions of Chapter IV of the Statute of the International Court of Justice as well as Part IV of the Rules of the Court concerning advisory proceedings in my view offer a good basis also for the elaboration of pertinent rules of procedure for the Sea-Bed Disputes Chamber in the exercise of its functions relating to advisory opinions.

I have already pointed out in my statement of 28 March that while a preliminary exchange of views on this item may be conducted at this stage, the final examination of that issue would have to be dealt concurrently with the consideration of this question by the Preparatory Commission in Plenary, because corresponding provision would have to be made in the rules, regulations and procedures of the Authority.

While it is necessary to specify in the rules, regulations and procedures of the Authority, among other things,

(1) In what manner the Assembly or the Council should arrive at a decision to make a request for an advisory opinion, and

(2) Who should act on behalf of these organs vis-à-vis the Sea-Bed Disputes Chamber in connection with such a request.

The following questions also need to be answered in connection with the drafting of rules of procedure for the Sea-Bed Disputes Chamber:

(a) Where a contentious case between the Authority and another party is before the Sea-Bed Disputes Chamber, could the Assembly or the Council request an advisory opinion on matters which are already under consideration in the contentious case?

/...

(b) Should the Rules of Procedure further elaborate on the provisions of article 191 of the Convention under which an advisory opinion shall be given as a matter of urgency?

(c) Article 185 provides for the submission to the Sea-Bed Disputes Chamber of questions of gross and persistent violations of Part XI. No action is to be taken without a finding of the Chamber. These proceedings would be instituted by the Council under article 162.2(u). Would these questions be submitted to the Chamber as contentious cases or as advisory opinions?

A brief exchange of views on these and other specifics of the Rules of Procedure for the rendering of advisory opinions by the Sea-Bed Disputes Chamber might certainly be helpful for the drafting of relevant procedural rules.

If the time available to this Special Commission permits we might, at our last meeting on Thursday, also briefly take up questions concerning procedures for the prompt release of vessels.

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LOS/PCN/SCN.4/1985/CRP.6
20 March 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Third session

SUGGESTED RE-DRAFT OF ARTICLE 62 PARA. 3

(LOS/PCN/SCN.4/WP.2)

ARTICLE 62 [6]

(1) -

(2) -

(3) If the Registrar arranges for the reproduction of a pleading at the request of a party, the text must be supplied in sufficient time to enable the pleading to be filed in the Registry before expiration of any time limit which may apply to it. The reproduction is done under the responsibility of the party in question.

(4) -

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[6] The agents of the parties are requested to ascertain from the Registry the usual format of the pleadings, and the conditions on which the Tribunal may bear part of the cost of reproduction.

LOS/PCN/SCN.4/1985/CRP.7
27 March 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED REDRAFT OF ARTICLE 79, PARAGRAPH 4 IN DOCUMENT LOS/PCN/SCN.4/WP.2

Article 79

(1) -

(2) -

(3) -

(4) In the foregoing paragraphs, the term "international organization" denotes an international organization constituted by States with the exception of those organizations referred to in article 1 of Annex IX to the Convention. 1/

1/ Consequential changes will have to be made in paragraphs 1 to 3 of article 79.

/...

LOS/PCN/SCN.4/1985/CRP.8
29 March 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

Privileges and Immunities of the Tribunal

Statement by the Special Representative of the Secretary-General for the Law of the Sea

During the deliberations of Special Commission 4 concerning articles 47 to 51 of the draft Rules of the Tribunal, LOS/PCN/SCN.4/WP.2, a request was made to the Secretariat for information on certain aspects of the question of privileges and immunities. In consultation with the Office of Legal Affairs, I am pleased to have this opportunity to respond to the request.

I

Information was sought on the practice of the International Court of Justice and other competent courts in dealing with the question of privileges and immunities accorded to representatives of the parties and functionaries of the Court. In response to this request, I should like to note at the outset that the issue of representation of parties before a court or tribunal constitutes only one aspect of the general question of the privileges and immunities of that judicial body. For this reason, that aspect should not be viewed in isolation and should be examined in the context of the general framework.

The legal basis of the privileges and immunities of the International Court of Justice is found in Articles 104 and 105 of the United Nations Charter, which applies to the Organization as a whole, the Court being its principal judicial organ. The 1946 Convention on the Privileges and Immunities of the United Nations is built upon these Charter provisions and is applicable to the Court.

The relevant provisions of the Statute of the Court, i.e. articles 19 and 42, were supplemented by an Agreement between the Court and the Government of the Netherlands, and by resolution 90 of the General Assembly at its first session. The privileges and immunities of representatives of the parties before the International Court of Justice operate therefore within this general framework established by way of parallel and supplementary legal instruments.

/...

The 1946 Convention is not applicable to the International Tribunal for the Law of the Sea since it is not a part of the United Nations. These privileges and immunities accorded to the representatives of member states, United Nations officials and to experts on mission for the Organization, are however relevant to the issues under consideration.

In accordance with this Convention, "representatives of member states" are provided with diplomatic privileges and immunities. These include, for example:

(i) Immunity from personal arrest or detention and from seizure of their personal baggage;

(ii) In respect of words spoken or written and all acts done by them in that capacity, immunity from legal process of every kind;

(iii) Inviolability of all papers and documents;

(iv) The right to use codes and to receive papers by courier or in sealed bags;

(v) Exemption from immigration restrictions;

(vi) The same facilities in respect of currency as are accorded to representatives of foreign governments;

(vii) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

"Officials of the United Nations" in general are accorded functional immunities. Officials above the rank of Assistant Secretary-General enjoy diplomatic privileges and immunities.

"Experts on mission for the United Nations" are accorded privileges and immunities similar to representatives of States but to a lesser extent.

Bearing in mind the provisions concerning "experts", "witnesses", and "expert witnesses" in the draft Rules of the Tribunal, it may be of interest to note the practice of the United Nations regarding the phrase "expert on mission for the United Nations". This phrase has been interpreted to include all persons performing a mission for the United Nations in an advisory or consultatative status, who by reason of their status, are neither representatives of Government nor officials of the Organization, but who, for the independent exercise of their functions in connexion with the Organization, must enjoy such privileges and immunities. Thus, they include for example, members of certain Commissions and Committees of the United Nations, who serve in their individual capacity and not as government representatives. In practice, "technical assistance experts" are treated as "officials" in order to enable the executive head to exercise the responsibilities vested in him. A small number of such experts are however engaged from time to time as "experts on mission" when it is deemed unnecessary or inadvisable to bring them under the authority of an executive head.

/...

The International Court's Statute contains only a general provision regarding the privileges and immunities of its members and representatives of the parties. It makes no reference to privileges and immunities to be enjoyed by assessors experts and witnesses. Since the Statute forms an integral part of the United Nations Charter, its legal force extends therefore to all member states of the United Nations, including the host country, the Netherlands.

In 1946, certain general principles concerning the privileges and immunities of the Judges, Registrar and representatives of the parties were agreed upon between the Court and the Netherlands through an exchange of letters dated 26 June 1946 between the President of the Court and the Minister for Foreign Affairs of the Netherlands. According to these principles, the agents, counsel and advocates of the parties are accorded "such privileges, immunities and facilities for residence and travel as may be required for the independent exercise of their functions"; witnesses and experts are accorded the immunities and facilities "necessary for the fulfilment of their mission."

Since the Court is an organism and its members and staff perform duties of a special character, its requirements were consequently different from those of the other organs of the United Nations. In 1946, upon the recommendations of the Court, the General Assembly in recognition of the need adopted Resolution 90 (I), the purpose of which was to elaborate on certain categories of privileges and immunities for the members of the Court, Assessors, the Registry, representatives of the parties, witnesses and experts. These provisions were intended to be applicable to all member States and non-member States admitted to the Statute.

The first category relates, for example, to diplomatic privileges and immunities accorded to judges residing in some country other than his own, to the freedom of entry and egress from such country, and to the grant of the privileges of diplomatic envoys while in transit. In the second category are recommendations concerning agents, counsel, advocates, assessors, witnesses and experts. In general it was recommended to apply various appropriate provisions of the General Convention on the Privileges and Immunities of the United Nations. Thus, for example, representatives of the parties before the Court are accorded, during the entire period of their mission, the same privileges and immunities enjoyed by representatives of member states. Assessors, witnesses and experts were treated on the same basis as "experts on mission for the United Nations". Mention has been made of some of their rights and immunities.

It is relevant to note that although General Assembly Resolution 90 (1) is in the form of a recommendation, its legal force is however derived from the general obligations laid down in Articles 104 and 105 of the United Nations Charter and the Statute of the Court.

Turning to some regional examples, for instance, the European Court of Justice, the privileges and immunities of representatives of the parties before that Court are laid down in the Court's Statute and further elaborated

/...

in its Rules of Procedure. Accordingly, agents, advisors and lawyers appearing before the Court enjoy immunity in respect of words spoken and written by them concerning the case or the parties. Privileges and facilities are also granted for the following purposes: papers and documents relating to the procedure are exempt from both search and seizure; they are entitled to allocation of foreign currency necessary for the performance of their duties, and to travel within the course of duty without hindrance. In order to qualify for the above-mentioned privileges, immunities and facilities, they have to furnish proof of their status.

Since the Statute and the Rules of the European Court are applicable in the territories of the member states of the Court, the question of transit is therefore covered.

Unlike the ICJ and the European Court of Justice, a different approach was adopted in the European Court of Human Rights. In view of the need to provide rights and immunities of persons participating in the proceedings at the seat of the Court or elsewhere, member states of the Council of Europe adopted in 1961 an international legal instrument which lays down privileges, immunities and facilities for all persons who have a right or may be required to take part in proceedings of the Court. They are largely identical to those just mentioned under the European Court of Justice. But the right to correspond freely with the Court and the right of re-entry into the territory where the person's journey commenced, were specifically mentioned. These additions might be due to the sensitive nature of the subject matter, i.e. human rights.

II

During the discussions in Special Commission 4, questions were raised regarding the privileges and immunities of officials of the Authority and those accorded to representatives of members of the Authority for the purpose of representation before the Tribunal and the Sea-Bed Disputes Chamber. An examination of the relevant provisions in the Law of the Sea Convention and its annexes shows that the Authority, including the Secretary-General and the staff, have under these provisions adequate privileges and immunities for all practical purposes for their presentation of cases before the Tribunal. Careful consideration may be necessary however for representatives of Member States, the Enterprise and its staff to the extent that they may be required to appear before the Tribunal or the Sea-Bed Disputes Chamber.

It may be noted that under the relevant provisions, privileges and immunities granted to the representatives to the Authority are limited for the purpose of "attending meetings". Presumably this does not cover representation before the Tribunal.

The privileges and immunities of the Enterprise set forth in Annex VI, Article 13, were drafted, it seems, essentially for its business operations. Different opinions might be expressed as to their relevance to or adequacy for the purpose of making representation before the Tribunal. In any event, these provisions do not cover the rights and immunities of the representatives of the Enterprise before the Tribunal.

In the event that the International Sea-Bed Authority becomes a "specialized agency" of the United Nations pursuant to Article 169 of the Law of the Sea Convention and Articles 57 and 63 of the United Nations Charter, certain provisions in the 1947 Convention on the privileges and immunities of the Specialized Agencies may become relevant. Section 29 of that Convention requests States Parties to grant travel facilities to "experts and other persons" who are travelling "on the business of a specialized agency". As already mentioned, the term "experts" has acquired a certain meaning in the United Nations system. A determination might have to be made whether agents, counsel, advocates, experts and witnesses of the Authority or its organs could come under this section.

It would appear that the questions raised are not completely resolved under the existing provisions of the Law of the Sea Convention.

III

During the discussions in Special Commission 4, reference was made to the applicability of the Vienna Convention on Diplomatic Missions of 1961, the Vienna Convention on Consular Relations of 1963, and the Convention on Special Missions of 1969. These instruments regulate diplomatic and consular relations between the sending and the receiving state; they lay down in details the obligations of the receiving state and the privileges and immunities to be granted to representatives of the sending states in the receiving state. It should be noted that the establishment of diplomatic or consular relations between states, and of permanent or special missions takes place only by mutual consent.

Under these conventions, the third state, which obviously has to be a Party to the instruments, is required to grant the representative of a sending state returning from or in transit to the receiving state such immunity as he may require for that purpose. The third state is not to hinder the passage of members of the administrative, technical and service staff. It is to accord to official correspondence in transit, including messages in code or cipher, the same freedom and protection as the receiving state is bound to accord under these Conventions.

It could be argued that the issues presently under consideration are relevant to such consular functions as protecting the interest of the sending state and its nationals, arranging representations for them before the tribunals and other authorities of the receiving states, and extending assistance to vessels and aircraft of the sending state's nationality. It appears that such functions could also form the basis of a special mission, thus triggering the application of the 1969 Convention on Special Missions. Accordingly, it might be argued that the immunities and facilities accorded under the Consular Relations

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Convention and the Convention on Special Missions could be invoked in a practical manner for the representation before the Tribunal. Similarly, the obligation of the third state with respect to representatives in transit could also be invoked for the same purpose.

It should be noted that the functions mentioned in these two instruments are to be performed in relation to the receiving state. Indeed this was the very purpose of these instruments. Since the International Tribunal for the Law of the Sea does not really constitute part of the receiving state it could be contended that they are not applicable in the present case. Thus, there could be divergent views on the applicability of these conventions in this regard.

IV

In the light of the above survey, it is clear that in order to ensure the proper functioning of a court or tribunal, its privileges and immunities should be established on a sound legal basis. Practice shows that such a legal basis may be established either by the basic instrument establishing the institution, as in the case of the International Court of Justice and the European Court of Justice, or by a separate legal instrument as in the case of the European Court of Human Rights.

The United Nations Convention on the Law of the Sea does not lay down either in the main body of the Convention or in its annexes any provision on the privileges and immunities of the International Tribunal for the Law of the Sea. The only relevant provision is Article 10 of the Statute of the Tribunal which provides that:

> "The members of the Tribunal, when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities".

Consequently, a legal lacuna exists. Provisions are therefore needed to deal with not only those general aspects concerning the Tribunal (e.g. property, facilities, judges and ad hoc judges, Registry and its staff) but also rights, immunities and facilities for the representatives of the parties, witnesses and experts.

The discussions in Special Commission 4 indicated quite clearly that the Rules of Procedure of the Tribunal would not be an appropriate place to deal with the requisite privileges and immunities of the representatives of the parties before the Tribunal.

The long standing practice of international courts and tribunals furnishes the evidence that these representatives and functionaries are entitled to such privileges, immunities and facilities as may be required to ensure the proper exercise of their functions, even though this has not excluded or eliminated the need for specificity or supplementary rules. On the basis of the practice

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mentioned above, it would seem possible to extract a set of rules and standards. This exercise should not be performed in abstract but should be guided by the requirements of the International Tribunal for the Law of the Sea.

As shown, in the case of the United Nations system, separate conventions have been adopted to elaborate on the necessary privileges and immunities for the fulfilment of the purposes of these Organizations. In the case of the Tribunal, some aspect of privileges and immunities could presumably be included in the headquarters agreement with the host country of the Tribunal, although such instruments are used normally for making practical and physical arrangements concerning the seat of an institution.

It has however been contended that the Tribunal lacks the necessary legal competence to negotiate with the host country regarding its privileges and immunities, in view of the silence or absence in the Convention of a provision enabling the Tribunal to do so. On the other hand, it could also be argued that privileges and immunities are so fundamental to the proper functioning of the Tribunal that it is implicit in Article 1 of its Statute that it has the necessary competence to secure for itself facilities needed for the effective conduct of its business and the fulfilment of its purposes.

Even on the assumption that the headquarters agreement could be used to deal with certain requirements of the Tribunal, the agreement itself, however, has no legal effect beyond the headquarters and the territory of that country.

According to the Statute of the Tribunal, it may sit and exercise its functions elsewhere whenever it considers that desirable. The Tribunal may also conduct enquiries and obtain evidence in the localities to which a case relates (draft rules 76 and 77). Consequently, a headquarters agreement cannot meet adequately all these requirements outside the seat of the Tribunal.

The conclusion of additional agreement on an as-needed basis may be considered, but this would be time-consuming and may not be available at short notice. This inadequacy can be discerned in cases involving the prompt release of vessels and in cases involving natural or juridical persons.

The Tribunal is open not only to States but also to organs of the Authority and natural and juridical persons. While agents, counsel or advocates of a state while in transit may have a right to claim diplomatic privileges and immunities under the relevant international instruments, the actual enjoyment of such rights are subject to reciprocity and the relationship between the States concerned. As already mentioned, the rights and immunities are not completely satisfactory under the existing legal framework insofar as they relate to the representatives of the Authority or its organs, or the representatives of members of the Authority involved in cases before the Tribunal. Furthermore, no rights or immunities are granted under the existing framework for representatives of other entities which are potential users of the Tribunal for the purpose of their representations before the Tribunal.

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Consideration should also be given in this connection to other persons (e.g. experts and witnesses) who may be required to participate in the proceedings of the Tribunal: what rights, immunities and facilities should they be given, and if so, in what manner?

Finally, the question should also be addressed whether privileges, immunities and facilities to be accorded to representatives of the parties before the Tribunal should be distinguished on the basis of the status of the parties (e.g. states, organs of the Authority or natural or juridical persons).

To recapitulate the main points:

(i) There is a need to stipulate and elaborate the requisite privileges and immunities for the Tribunal;

(ii) The conclusion of a headquarters agreement would only have legal effect within the host country;

(iii) The conclusion of additional or supplementary agreements on an as-needed basis would not be effective and could not meet the Tribunal's perceived need;

(iv) Representatives of the potential users of the Tribunal enjoy either no protection or inadequate protection under the existing provisions for the purpose of making representations before the Tribunal;

(v) The rights, immunities and facilities for experts and witnesses also need to be considered.

In the light of these observations, it would seem desirable that all these issues should be dealt with in an integrated manner.

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LOS/PCN/SCN.4/1985/CRP.9
1 April 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

PRIVILEGES AND IMMUNITIES OF THE TRIBUNAL

STATEMENT BY THE CHAIRMAN

Very useful information has been provided by the Special Representative of the Secretary-General (LOS/PCN/SCN.4/1985/CRP.8) concerning the question of privileges, immunities and facilities especially with regard to agents, counsel and advocates of parties before the Tribunal which was under discussion in this Special Commission.

The position prevailing from the views expressed in the Special Commission seems to be quite clear that it would not be appropriate to fill in any lacunas which are left in the Convention concerning this type of privileges and immunities by making provisions in the draft Rules because privileges and immunities can only be secured if the States that have to provide them have expressly agreed to do so. Hence, these privileges and immunities cannot be established unilaterally merely by their incorporation in the Rules of the Tribunal. This is particularly so in view of the fact that the Tribunal under Article 16 of its Statute adopts its own rules and may moreover amend them at any time without the consent of the States Parties and because the agreement of States which have to provide these privileges and immunities is necessary.

Accordingly, the first category of privileges and immunities we discussed earlier, namely, those which the host country has to provide, would have to be dealt with in the Headquarters Agreement.

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The second category we identified is the privileges and immunities to be provided by any other country where the Tribunal may sit and exercise its functions in accordance with Article 1, paragraph 3 of the Statute (Annex VI).

The third category is the privileges, immunities and facilities that would be provided to agents, counsel, advocates, witnesses and experts before the Tribunal who have been designated as such. They would be accorded with such privileges and facilities for instance, when they are in transit.

The Special Representative has informed us that regarding the second and third categories, there is an existing practice which is provided in multilateral instruments and other arrangements in the case of the International Court of Justice and for other Tribunals. A suitable recommendation would therefore have to be made in the Report to be submitted to the meeting of States Parties in accordance with para. 10 of Resolution I, so that it can take the necessary action in this connection.

These matters would have to be discussed at a later stage of our work. We have on the agenda of this Special Commission the item: Headquarters Agreement and we could discuss these matters in that context.

After we have had this general exchange of views concerning this problem of privileges, immunities and facilities, I don't think it would be useful to continue the discussion on draft Articles 47, 48 and 49. We can come back to these draft articles if necessary after we have had a substantive discussion concerning the above mentioned privileges, immunities and facilities. Then we could also discuss the question whether we will need in these draft Rules some kind of general provision on these matters.

As regards Articles 50 and 51 we have had a detailed discussion and I will reflect those discussions when I am summarising the discussion on Section C.

LOS/PCN/SCN.4/1985/CRP.10
2 April 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED RE-DRAFT OF ARTICLE 84, PARAS. 2, 3, 4
(LOS/PCN/SCN.4/WP.2)

Article 84

(1) -

(2) If the Tribunal is not in session or if a sufficient number of its members is not available to constitute a quorum, the Chamber of Summary Procedure formed under Article 15, para. 3 of the Statute and Article 16 of these Rules shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.

(3) The Tribunal, or the President if the Tribunal is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Tribunal or Chamber of Summary Procedure as the case may be shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

(4) Pending the meeting of the Tribunal or Chamber, the President may call upon the parties to act in such a way as will enable any order the Tribunal or Chamber may make on the request for provisional measures to have its appropriate effects.

Note: changes noted are underlined.

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LOS/PCN/SCN.4/1985/CRP.11
2 April 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

EXPLANATORY STATEMENT BY THE SECRETARY ON SUPPLEMENT TO THE DRAFT RULES OF THE TRIBUNAL ON THE PROMPT RELEASE OF VESSELS AND CREWS (LOS/PCN/SCN.4/WP.2/Add.1)

1. LOS/PCN/SCN.4/WP.2/Add.1 provides the set of supplementary rules (numbered Articles 88A to E) to deal with the question of the prompt release of vessels and crews. It will be recalled that at the 11th informal meeting of Special Commission 4, a request was made to the Secretariat to prepare the subsidiary procedural rules that are necessary to give effect to the relevant provisions of Article 292 of the Convention.

History of Article 292

2. Article 292 was the outcome of intense negotiations at the Third United Nations Conference on the Law of the Sea on a matter of special concern to many delegations. The concern was that if a ship or vessel is arrested because of a violation of coastal state regulations and if the Convention provides for its release on the posting of a bond or other security, then there should be an assurance that the release could be effected promptly, for otherwise the vessel, owner, or charterer would be subjected to substantial expenses while the vessel is kept idle under detention. It was not considered adequate to rely on the substantive provisions of the Convention which called for the release of the vessel on the posting of a bond or other security because the release would be subject to proceedings in a national court of the detaining state or its administrative procedures which may be time consuming.

3. It was thus considered important to have access to an international forum in a case where there was delay in releasing the vessel. Such delay

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may be either procedural, as referred to above, or by imposing an unreasonable bond or security requirement. Article 292 was formulated to resolve this problem. The origin of the article can be traced to a proposal made before the Sea-Bed Committee in 1973 (document A/AC.138/97, Article 8(2)). This was discussed at an early stage of the Conference. While the principle of resort to an international tribunal to secure the release was considered acceptable, the parties who could apply for that release was controversial. There was an unwillingness to accept that the captain or crew of the vessel or its owners or charterers should have access to the tribunal or Court since at that time it was not clear whether natural or juridical persons would have access to the dispute settlement procedures under the Convention. There was always objection to the release of the cargo of the vessel since that may, of itself, constitute the subject of the violation of coastal state regulations. The result was that in the succeeding revisions of the negotiating text, the principle of release of the vessel and crew was maintained and the right of the flag state to make the application was also maintained.

In the final result, the right was given to the flag state to authorize anyone to act on its behalf before the Court or tribunal.

Provisions of Article 292

Article 292 of the Convention therefore provides that where a ship or vessel has been detained for violation of coastal state regulations, such as fisheries or marine pollution, and if the substantive provisions of the Convention provides for its release upon the posting of a bond or financial security, then access could be had to an international court or tribunal if the release could not be obtained promptly. Relevant substantive provisions are to be found, for instance, in Articles 73, 220 and 226 of the Convention.

In any such case, the application for release is only to deal with that question and is without prejudice to the merits of any case before the appropriate national court against the vessel, its owner or its crew. This article deals with the question as to who may apply for the release in a flexible manner by permitting the application to be made by the flag state of the vessel, or on its behalf. By permitting the application on behalf of the flag state, it permits the flag state to authorize any appropriate person to act such as a diplomatic or consular officer at the seat of the Tribunal or the owner, captain or crew to act for this purpose.

Supplement to Draft Rules of the Tribunal (Articles 88A-E)

In formulating the draft rules, special attention was given to ensuring that the draft rules would be in conformity with Article 292;

that they would provide the necessary elaboration of that article as regards the procedure before the Tribunal; that they would give effect to the spirit and objectives of the article and that they would permit the Tribunal to act expeditiously in the case. In doing so, it was borne in mind that the rule should not be a mere repetition of the provisions of Article 292 but would have the minimum cross references to that article rather than repeating its content. Attention was also paid to the terminology used concerning the bond or other financial security in the relevant multilateral instrument which is the International Convention for the Unification of certain Rules relating to the Arrest of Sea-going Ships, done in Brussels on 10 May 1982.

Article 88A

This article deals with how applications are made, by whom and what it should contain.

Paragraph 1 refers to Article 46 of the Rules which uses a flexible formulation consistent with Article 292, para. 2, i.e., it permits captain or crew members or any other person to represent the flag State in making the application.

Paragraph 2 permits the flag State to authorize any one of these persons, either when the detention takes place or to do it in advance and submit it to the Tribunal.

Paragraph 3 deals with the authentication of the application as required by Article 40 of the Rules.

Paragraph 4 indicates the details that should be specified in the application which would form the basis for the Tribunal to examine the application. It includes such matters as the time and location of the detention, details concerning the vessel and crew, details relevant to the vessel's value and information regarding any bond or other security requirement imposed by the detaining state and the extent to which this has been complied with. It also calls on the Registrar to promptly notify the detaining State by sending a certified copy of the application.

Paragraph 5 deals with the time limit of 10 days given to the parties under Article 292 to agree on the international forum to which the application is to be submitted. This paragraph also deals with the situation where the detaining state and the flag state have both earlier agreed by declarations under Article 287 of the Convention to accept the jurisdiction of the Tribunal or where they agree on its jurisdiction after the detention takes place.

Article 88B

Paragraph 1 of this article calls on the Tribunal to deal with the matter without delay as required by Article 292, in paragraph 3.

Paragraph 2 provides for the fixing of the date of hearings and for the parties to present their oral or written observations which are required to be taken into account. There is no requirement for the formalities of memorials and counter-memorials as required in the usual case, since that could delay the proceedings.

Paragraph 3 indicates the urgency of making a determination and describes the determination that is to be made in the case. It thus follows the language of Article 292. In view of the fact that the detention of the vessel is intended only to give the detaining state the security of its value, this paragraph indicates that the bond or security should not exceed that value.

Paragraph 4 deals with what should happen when the Tribunal is not sitting and permits the Chamber of Summary Procedure to act in the matter, if the parties so agree.

Article 88C

Paragraph 1 describes the kind of order that the Tribunal or Chamber would make.

Paragraph 2 requires the Registrar to communicate this to the parties.

Paragraph 3 calls on the Registrar to notify the detaining State when the required bond or security has been deposited with the Tribunal. At this stage the detaining State is also informed of the order for the release which, under Article 292, para. 4, the detaining state is bound to comply with promptly. The order could be either for the release of the vessel or its crew, or both.

Article 88D

This article provides for the detaining State to notify the Tribunal of the release which, when confirmed, results in the termination of proceedings by the Tribunal.

Article 88E

Paragraph 1 provides that the Registrar should release the bond or other financial security to the detaining state, but only to the extent that that would be necessary to satisfy the decision of the national court against the vessel or its crew.

Paragraph 2 deals with the return of any excess value of the bond or security to the flag State, if the amount of that security exceeds what is necessary to satisfy the judgement of the national court.

LOS/PCN/SCN.4/1985/CRP.12
29 August 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED REDRAFT OF ARTICLE 98 IN DOCUMENT LOS/PCN/SCN.4/WP.2

(Prepared by the Secretariat)

Subsection 6. Special reference to the Tribunal

Article 98

1. When the Convention so provides or in accordance with an international agreement in force conferring jurisdiction on the Tribunal, a dispute is submitted to the Tribunal concerning a matter which has been the subject of proceedings before another international court or tribunal or other international body, the provisions governing disputes in the Statute and these Rules shall apply.

2. The application or notification of a special agreement instituting proceedings before the Tribunal shall identify the decision or other act of the court or tribunal or of the international body concerned and a copy thereof shall be annexed; it shall contain a precise statement of the questions raised in regard to that decision or act, which constitute the subject of the dispute referred to the Tribunal.

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LOS/PCN/SCN.4/1985/CRP.13
29 August 1985

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED REDRAFT OF ARTICLE 108 IN DOCUMENT LOS/PCN/SCN.4/WP.2

(Prepared by the Secretariat)

Article 108

The Tribunal shall make a consequential order whenever necessary for the purpose of giving effect to a decision, under article 34 of its Statute, that all or part of a party's costs shall be paid by the other party.

LOS/PCN/SCN.4/1985/CRP.14
29 August 1985

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED REDRAFT OF ARTICLES 110-112 IN DOCUMENT LOS/PCN/SCN.4/WP.2

(Prepared by the Secretariat)

Article 110

1. A request for revision of a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. A request for the revision of a decision shall be made by an application containing the particulars necessary to show that the conditions specified in paragraphs 1, 3 and 4 of this article are fulfilled. Any document in support of the application shall be annexed to it.

3. The application for revision must be made at latest within six months of the discovery of the new fact.

4. No application for revision may be made after the lapse of 10 years from the date of the decision.

5. The other party shall be entitled to file written observations on the admissibility of the application within a time-limit fixed by the Tribunal, or by the President if the Tribunal is not sitting. These observations shall be communicated to the party making the application.

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6. The Tribunal, before giving its judgement on the admissibility of the application, may afford the parties a further opportunity of presenting their views thereon.

7. The proceedings for revision shall be opened by a judgement of the Tribunal expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

8. When appropriate, the Tribunal may require previous compliance with the terms of the decision in respect of which the application is made before it admits proceedings in revision. In such case it shall make an order that the admission of proceedings in revision is conditional on previous compliance with such decision.

9. If the Tribunal finds that the application is admissible it shall fix time-limits for such further proceedings on the merits of the application as, after ascertaining the views of the parties, it considers necessary.

[Note: Since Articles 110 and 111 have been combined, all subsequent articles will have to be renumbered accordingly.]

Article 112

1. If the decision to be revised or to be interpreted was given by the Tribunal, the request for its revision or interpretation shall be dealt with by the Tribunal. If the decision was given by a chamber, the request for its revision or interpretation shall be dealt with by that chamber and if that not be possible then a chamber composed in a similar manner. If the composition of the chamber requires the approval of the parties which cannot be obtained within time limits fixed by the Tribunal, the request shall be dealt with by a chamber constituted in a similar manner by the Tribunal.

2. The decision of the Tribunal, or of the chamber, on a request for interpretation or revision of a decision shall itself be given in the form of a judgement.

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LOS/PCN/SCN.4/1986/CRP.15
21 March 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED REDRAFT OF ARTICLES 4 (1) AND 9 (5)
LOS/PCN/SCN.4/WP.2

ARTICLE 4

Paragraph 1

The declaration to be made by every Member of the Tribunal in accordance with article 11 of the Statute shall be as follows:

> "I solemnly declare that I will perform my duties and exercise my powers as member honourably, faithfully, impartially and conscientiously and that I shall maintain and preserve the secrecy of any confidential information coming to my knowledge as a consequence of my membership even after the expiry of my term of office".

ARTICLE 9

Paragraph 5

Before entering upon their duties, experts shall make the following declaration at a public sitting:

> "I solemnly declare that I will perform my duties as an expert honourably, impartially and conscientiously, that I will faithfully observe all the provisions of the Statute and of the Rules of the Tribunal, and that I shall maintain and preserve the secrecy of any confidential information coming to my knowledge as a consequence of my sitting with the Tribunal even after the termination of my functions."

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LOS/PCN/SCN.4/1986/CRP.16
27 March 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

SUGGESTED REDRAFT OF ARTICLE 129 (1)
LOS/PCN/SCN.4/WP.2

Paragraph 1

The Registrar shall forthwith give notice of the request for an advisory opinion to all States parties. Any State party may present a written statement or be heard on the question upon which the advisory opinion has been sought and the Chamber shall decide on the manner and time-limit for such presentation.

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LOS/PCN/SCN.4/1986/CRP.17
4 April 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

Suggested redraft of Preamble
LOS/PCN/SCN.4/WP.2
(prepared by the Secretariat)

Preamble

The Tribunal

Having regard to the United Nations Convention on the Law of the Sea, hereinafter referred to as the "Convention", and in particular Parts XI and XV thereof;

Having regard to the Statute of the Tribunal annexed thereto, hereinafter referred to as the "Statute";

Acting in pursuance of article 16 of the Statute,

Adopts the following Rules of the Tribunal, approved on ...., which shall come into force on ....

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LOS/PCN/SCN.4/1986/CRP.18
4 April 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

Suggested redraft of Articles 64 and 84
LOS/PCN/SCN.4/WP.2
(Prepared by the Secretariat)

Article 64

Paragraph 2

When fixing the date for, or postponing, the opening of the oral proceedings the Tribunal shall have regard to the priority required by articles 84 and 88B [a] of these Rules, to any other special circumstances, including the urgency of a particular case and the views of the parties.

Article 84

Paragraph 1

A request for the prescription of provisional measures shall have priority over all other cases. This shall not affect applications under Article 292 of the Convention which shall be dealt with without delay.

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[a] Paragraph numbers will have to be adjusted when revising the text.

LOS/PCN/SCN.4/1986/CRP.19
8 April 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4

Preliminary information on the Establishment of Facilities for International Courts or Tribunals

(Prepared by the Secretariat)

During the third session of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, at its 12th meeting of Special Commission 4, the Commission requested the Secretariat to provide information pertaining to the establishment of headquarters facilities for the Tribunal.

The request posed was:

> "Based on the experience and expertise of the United Nations concerning the establishment of headquarters and offices, indicate with specific figures the time needed to establish the Headquarters of the Tribunal and to equip it to be fully functional immediately after the Judges are elected - which is by a meeting of States Parties to be convened within six months after entry into force of the Convention."

As indicated by the Secretariat, it was necessary to consult with the appropriate departments of the Organization which deal with administration, in particular, that responsible for buildings and management, before responding. An indication of the information thus received was conveyed to this Special Commission. That information was based on the experience of United Nations offices such as the United Nations Environment Programme (UNEP), United Nations Centre for Human Settlements (UNCHS), United Nations University (UNU), United Nations Industrial Development Organization (UNIDO), International Atomic Energy Agency (IAEA), and the Regional Economic Commissions, in addition to United Nations Headquarters in New York. That interim response was reported on in the Chairman's summary, LOS/PCN/L.24 and Corr.1 (in para. 8). In the absence of recent experience of the establishment of courts or tribunals within the aegis of the United Nations, that information was based on other facilities. The Secretariat thus sought information on experiences in the relevant area outside of the aegis of the United Nations. The inquiries were addressed to the following:

- The European Court of Human Rights (Strasbourg);
- The Court of Justice of the European Communities (Luxembourg);
- The Inter-American Court of Human Rights (San Jose, Costa Rica);
- The Tribunal of Justice of the Agreement of Cartagena (Ecuador).

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Specific information was also requested from the International Court of Justice (Hague). Extremely relevant and detailed information as to needs and facilities was received from the Registrar of the International Court of Justice (ICJ). However, the experience of planning and construction of the Court is somewhat outdated, the Peace Palace having been built in the period 1907 to 1913. Notwithstanding the fact, it would appear that some of the criteria applicable to the Court warrants consideration. These relate to the nature and space requirements of the facilities.

The International Court of Justice (Hague)

The area occupied by the Court includes 2,000 sq m in the Peace Palace and 1,300 sq m in a new wing, totalling 3,300 sq m. This space is shared with the Permanent Court of Arbitration, for which it was built and which is still seated there. The Academy of International Law occupies a number of conference rooms in the Peace Palace. Space is also taken up by the Peace Palace Library (approximately 600,000 volumes). The Court has a separate library (35,000 volumes).

A new wing constructed between 1975 and 1978, a period of three years, houses:

- the offices of the members;
- the offices of their secretaries;
- a large conference room; and
- three small conference rooms;
- Library (35,000 volumes).

The factors that influenced the size and accommodation of the new wing were the following:

(a) The court has 15 members.

(b) There are sometimes ad hoc judges, at any time up to three, thus, in all, 18 offices are provided for judges. But this has proved inadequate at times since there are judges who continue to discharge their duties even after their mandates have expired and successors have been appointed.

(c) The staff currently number approximately 40 permanent members and 10 to 20 temporary staff during peak periods. In this connection, it is relevant to note that the Court functions in two official languages and the staffing includes the language services. The registry staff are not located in the new wing but in the Peace Palace itself.

The European Court of Human Rights (Strasbourg)

The seat of the European Court of Human Rights was not fixed by the Human Rights Convention but by the Court's own Rules. The expenses are borne by the Council of Europe. The Court and its registry are housed in a single building along with the European Commission of Human Rights and its secretariat, and also the staff of the Council of Europe's Directorate of Human Rights.

The site was provided by the City of Strasbourg and the building is under lease from the City to the Council of Europe. The usable surface area is 3,200 sq m and includes the Court's hearings and deliberations rooms and 70 small offices. It also includes a library and the Commission's meeting room. Construction began in 1962 and was completed in 1965. The Commission and the Court are not in permanent session. The Registrar has indicated that because of the increasing work-load, the facilities have become inadequate. Plans are under consideration to establish a new Human Rights Building. The planning includes the following time schedule for the different phases:

- 16 months for studying the project and finalizing the plan (up to invitations to tender);
- 5 months for the award of contracts;
- 30 months for the construction of the building.

The construction period is expected to last 4 1/4 years from the date of the appointment of the architect. The City of Strasbourg has let it be known that it is prepared to donate the site.

This is the most recent and up-to-date evaluation of planning and construction times received from the several sources.

The Court of Justice of the European Communities (Luxembourg)

The Court of Justice of the European Communities, occupies a rented building built by the Luxembourg government. Although considered adequate at the time it was built, it is now too small, and an annex is planned. No information is presently available as to the nature and specifications of the facility.

For the original building, the choice of site took four months. The design which was chosen through a competition took one year. The construction took a little over four years, at the end of which all of the facilities and equipment were installed, and the building was thus fully functional.

The Inter-American Court of Human Rights (San Jose)

The Inter-American Court of Human Rights does not occupy special premises but leases a large residential property in the downtown area. Due to financial constraints, it has not planned a specialized building. The Court itself has:

- 7 judges;
- a secretary and a deputy; and
- 4 registry staff.

/...

The building is on rental from the government and includes an audience room, a meeting room, a library, rooms for the judges and the staff. It also houses the Inter-American Institute of Human Rights which has approximately 14 staff. No further particulars are available from this source.

The Tribunal of Justice of the Agreement of Cartagena (Ecuador)

The Tribunal of Justice of the Agreement of Cartagena has the following facilities:

- offices for 5 judges or magistrates;
- office for the Secretary;
- Conference room, public audience room, administrative offices, library, etc.

The Tribunal operates out of a five-floor building which has been rented up to date and the Tribunal does not contemplate building or buying any property for the Headquarters.

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LOS/PCN/SCN.4/1986/CRP.20
18 August 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 11 August to 5 September 1986

SUGGESTED REDRAFT OF ARTICLE 1 (LOS/PCN/SCN.4/WP.2/Rev.1/PART I)

(Prepared by the Secretariat)

Article 1

Use of terms

For the purposes of these rules:

(1) "Convention" means the United Nations Convention on the Law of the Sea;

(2) "Statute" means the Statute of the International Tribunal for the Law of the Sea, annex VI of the Convention;

(3) "States Parties" shall have the same meaning as referred to in article 1 of the Convention;

(4) "International organization" shall have the same meaning as referred to in article 1 of annex IX of the Convention, unless otherwise specified;

(5) "expert appointed under article 289 of the Convention" means a person appointed in accordance with that article to sit with the Tribunal; 1/

(6) "Member" means an elected Member of the Tribunal as referred to in article 2 of these Rules;

1/ Consequentially delete article 2, para. 3.

/...

(7) "Ad Hoc member" means a person chosen under article 17 of the Statute for the purposes of a particular case; 2/

(8) "Authority" means the International Sea-Bed Authority;

(9) "Enterprise" means the organ of the Authority referred to in article 158, paragraph 2 of the Convention.

2/ Consequential changes would have to be made: All references to "expert witness" would read "expert".

LOS/PCN/SCN.4/1986/CRP.21
4 September 1986

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 11 August-5 September 1986

INFORMAL PROPOSAL OF THE BUREAU

1. If, at the latest, by the receipt of the 60th instrument of ratification of, or accession to, the Convention, the Federal Republic of Germany has not acceded to it, the Preparatory Commission will take the necessary decisions that would enable it, in accordance with resolution I, to make all practical arrangements for the establishment of the Tribunal in a State that has ratified the Convention or acceded to it.

2. These arrangements will be incorporated in the report containing recommendations of the Preparatory Commission to the Meeting of States Parties to be convened in accordance with annex VI, article 4 of the Convention.

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LOS/PCN/SCN.4/1987/CRP.22
5 August 1987
ENGLISH
ORIGINAL: RUSSIAN

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4
New York, 27 July-21 August 1987

SUGGESTED REDRAFT OF ARTICLES 89 TO 91 AND 93 (LOS/PCN/SCN.4/WP.2/Rev.1/Part I) SUBMITTED BY THE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS

1. Article 89, paragraph 4, second sentence

Replace relevant to the determination of its value by to be taken into account in determining the limit of liability.

2. Article 89

Add a new paragraph 5 reading:

5. If after the expiry of 10 days from the time of detention of the vessel and following the posting of a reasonable bond or other financial security as provided for in article 292, paragraph 1, of the Convention, the detaining State does not release the detained vessel and its crew, the flag State of the vessel shall be deemed to have fulfilled the requirements of article 295 of the Convention in the part relating to ensuring such release.

3. Article 90, paragraph 2

Replace a date, not exceeding two weeks by the earliest practicable date, but not exceeding 10 days

4. Article 90, paragraph 3

After notice of the application, insert but in any event not later than 10 days following the dispatch of the said notice,

/...

5. Article 91

Amend the article to read:

1. The Tribunal or Chamber shall forthwith make a determination as to the release of the vessel and its crew, and as to the nature, terms and amount of the bond or other appropriate financial security. The Tribunal or Chamber may determine that the nature, terms and amount of any bond or other financial security that may have been imposed by the detaining State are reasonable. The decision shall order the detaining State to release the vessel and its crew forthwith upon the posting of such reasonable bond or other appropriate financial security as the Tribunal or Chamber has determined. The Tribunal or Chamber may consider the guarantee by the flag State of the vessel as sufficient security.

2. At the request of the flag State of the vessel, the decision may indicate a State or a State authority or a juridical or natural person in favour of which such bond or other appropriate financial security shall be posted.

3. The Registrar shall promptly notify the flag State and the detaining State of the determination of the Tribunal or Chamber and of its order for the release of the vessel and its crew, as well as of the possible posted, in accordance with the wishes of the flag State, of the bond or other appropriate financial security with the Tribunal.

6. Article 93, paragraph 1

Amend the paragraph to read:

1. On receiving the final decision of the appropriate domestic court or tribunal against the vessel, its owner or its crew, the Registrar shall, on the instructions of the Tribunal, transmit the bond or other financial security, if in accordance with the wishes of the flag State it was posted with the Tribunal, to the detaining State in the amount necessary for execution of the said decision of the court or tribunal.

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LOS/PCN/SCN.4/1988/CRP.23
31 March 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4
Kingston, 14 March - 8 April, 1988

INFORMAL SUGGESTED REDRAFT OF ARTICLE 89 PARAGRAPH 4
DOCUMENT LOS/PCN/SCN.4/WP.2/REV. 1/PART I
(PROPOSED BY THE SECRETARIAT)
SUBSECTION 2. PROMPT RELEASE OF VESSELS AND CREWS

ARTICLE 89

1.

2.

3.

4. The application shall specify the time and location where the detention commenced, and contain a succinct statement of the facts and the basis and reasons for requesting release. The statement of facts shall contain relevant information concerning the vessel and crew including the name, flag, and the port or place of registration of the vessel and its tonnage, cargo capacity, data relevant to the determination of its value, the name and address of the vessel owner and operator and particulars regarding its crew. It shall also specify the amount, nature and terms of the bond or other financial security that may have been required by the detaining State and the extent to which such requirements have been complied with. A certified copy of the application shall forthwith be transmitted by the Registrar to the detaining State. The statement may include any further information the applicant considers relevant.

5. The Tribunal may, at any time, require further information to be provided in a supplementary statement.

*Note Underscoring indicates texual addition

LOS/PCN/SCN.4/1988/CRP.23/Rev.1
7 July 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988

INFORMAL SUGGESTED REDRAFT OF ARTICLE 89, PARAGRAPH 4 (DOCUMENT LOS/PCN/SCN.4/WP.2/REV.1/PART I) PROPOSED BY THE SECRETARIAT

SUBSECTION 2. PROMPT RELEASE OF VESSELS AND CREWS

Article 89

1.

2.

3.

4. The application shall specify the time and location where the detention commenced, and contain a succinct statement of the facts and the basis and reasons for requesting release. The statement of facts shall contain relevant information concerning the vessel and crew, including the name, flag, and the port or place of registration of the vessel and its tonnage, cargo capacity, data relevant to the determination of its value, the name and address of the vessel owner and operator and particulars regarding its crew. It shall also specify the amount, nature and terms of the bond or other financial security that may have been imposed by the detaining State and the extent to which such requirements have been complied with. The statement may include any further information the applicant considers relevant to the determination of the amount of a reasonable bond or other financial security and to any other issue in these proceedings.

Note: Underscoring indicates textual addition.

5. A certified copy of the application shall forthwith be transmitted by the Registrar to the detaining State which may submit a statement in response containing such information as the detaining State considers relevant, including information relating to the circumstances in which the vessel is detained and, if relevant, the extent of damage claimed to have been caused by the vessel.

6. The Tribunal may, at any time, require further information to be provided in a supplementary statement.

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LOS/PCN/SCN.4/1988/CRP.24
31 March 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Kingston, 14 March - 8 April, 1988

INFORMAL SUGGESTION RELATING TO THE DRAFT CONVENTION/PROTOCOL ON PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (LOS/PCN/SCN.4/WP.6)

Presented by the delegation of the Federal Republic of Germany

Article 2 paragraph 3*

In the event the Tribunal will sit and exercise its functions in accordance with Annex VI, article 1, paragraph 3 of the Convention, the State Party concerned should provide the appropriate facilities in accordance with international practice. Upon request of the Tribunal, the State Party concerned shall conclude an agreement covering such matters without delay.

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*This provision will cover cases where the Tribunal will have to sit and exercise its functions at a place other than the Headquarters in accordance with Annex VI, article 1, paragraph 3 of the Convention, for instance on short notice. The Protocol on Privileges and Immunities should contain a provision assuring that at least minimum standards are guaranteed by the State Party concerned. Such provision could either be placed after article 2 or elsewhere in the draft Protocol (LOS/PCN/SCN.4/WP...)

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LOS/PCN/SCN.4/1988/CRP.25
19 August 1988

ORIGINAL: ENGLISH

**PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988**

SUGGESTED REDRAFT OF ARTICLE 91 (LOS/PCN/SCN.4/WP.2/Rev.1/Part I) SUBMITTED BY THE DELEGATIONS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, PORTUGAL, SPAIN AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Article 91

1. The Tribunal or Chamber shall, forthwith, make a determination as to the release of the vessel or its crew upon the posting of a reasonable bond or other appropriate financial security, and the nature, terms and amount thereof. The Tribunal or Chamber may determine that the nature, terms and amount of any bond or other financial security that may have been imposed by the detaining State is reasonable. The Tribunal or Chamber may consider a guarantee by the flag State of the vessel as sufficient financial security provided that it is as enforceable as an ordinary bond deposited by any other person. The decision shall order the detaining State to release the vessel and its crew forthwith upon the posting of such reasonable bond or other appropriate financial security as the Tribunal or Chamber has determined. Nevertheless when dealing with a case under article 226 (1) (c) of the Convention, the Tribunal or Chamber shall take a decision concerning the release of the vessel taking into account the applicable international rules and standards relating to the seaworthiness of vessels.

2. As a rule, the bond or security shall be posted with the Tribunal. At the request of the flag State of the vessel, however, the Tribunal or Chamber may recognize as equally valid the posting of the bond or security in the detaining State in favour of an authority or a juridical or natural person within that State. The request shall include the consent of the detaining State and indicate all relevant data to determine the authority or juridical or national person in the detaining State with which the bond or security is to be posted.

/...

3. In the case of the posting of the bond or security with the Tribunal, the Registrar shall promptly notify the flag State and the detaining State thereof and of the order of the Tribunal or Chamber for the release of the vessel or its crew.

4. In deciding on a request of the flag State as to the posting of the bond or security in the detaining State, the Tribunal or Chamber must assure itself that, if the purpose of the bond or security no longer exists, reimbursement in freely transferable means of payment would be secured. In taking a decision accordingly, the Tribunal or Chamber shall make such determinations as are necessary to ensure the endorsement or reimbursement of the bond or security according to the final judgement or award of the appropriate domestic forum.

5. The Registrar shall communicate to the parties the determination and order of the Tribunal or Chamber.

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LOS/PCN/SCN.4/1988/CRP.2
19 August 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988

INFORMAL SUGGESTED REDRAFT OF ARTICLE 6 (LOS/PCN/SCN.4/WP.6) SUBMITTED BY THE DELEGATION OF AUSTRALIA

Article 6

Reimbursement of duty or tax

In the important purchase of goods and services necessary for the official activities of the Tribunal, when the price of such goods or services includes taxe or duties, States Parties shall, if possible, grant exemption from such taxes or duties or provide for their reimbursement if requested by the Tribunal.

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LOS/PCN/SCN.4/1988/CRP.27
22 August 1988
ENGLISH
ORIGINAL: FRENCH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988

INFORMAL SUGGESTED REDRAFT OF ARTICLE 7 (LOS/PCN/SCN.4/WP.6) SUBMITTED BY THE DELEGATION OF SWITZERLAND

Article 7

Official communications

1. For the purposes of its official communications, the Tribunal shall enjoy in the territory of each State Party treatment not less favourable than that which is generally accorded to intergovernmental organizations in the matter of priorities, rates and taxes applicable to mails and the various forms of telecommunications.

2. For the purposes of its official communications, the Tribunal may use appropriate means of communication and make use of codes. The States Parties shall impose no restriction on the official communications of the Tribunal and shall not apply any censorship to such communications.

3. The Tribunal may dispatch and receive its correspondence by courier or in bags, which shall have the same privileges and immunities as diplomatic couriers and bags.

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LOS/PCN/SCN.4/1988/CRP.28
26 August 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988

SUGGESTED REDRAFT OF ARTICLE 91 IN DOCUMENT LOS/PCN/SCN.4/WP.2/REV.1/PART I

(PREPARED BY THE SECRETARIAT)

1. The Tribunal or chamber shall forthwith make a determination as to the release of the vessel and its crew upon the posting of a reasonable bond or other appropriate financial security, and as to the nature, terms and amount thereof. The Tribunal or chamber may determine that the nature, terms and amount of any bond or other financial security that may have been imposed by the detaining State are reasonable. At the request of the flag State, the Tribunal or chamber may consider as sufficient financial security a guarantee which is enforceable under international commercial practice, or a guarantee by the flag State accepted in practice between the flag State and detaining State.

2. The order of the Tribunal or chamber shall indicate that the bond or other financial security shall be posted with the Tribunal, unless a bond or security consistent with the nature, terms and amount determined by the Tribunal or the chamber has been posted earlier with the detaining State, or at the request of the flag State the Tribunal or chamber determines that it should be posted with the detaining State. In the latter case, after ascertaining the views of the detaining State, the order shall indicate the competent authority of the detaining State with which the bond or other financial security shall be posted.

3. The Registrar shall immediately communicate to the parties the determination and order of the Tribunal or chamber.

4. Upon the posting of the bond or other financial security with the Tribunal or with the detaining State, as determined by the Tribunal or chamber, the Registrar shall promptly notify the parties and communicate the order of the Tribunal or chamber for the release of the vessel and/or its crew.

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LOS/PCN/SCN.4/1988/CRP.29
30 August 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988

SUGGESTED REDRAFT OF ARTICLE 93 (LOS/PCN/SCN.4/WP.2/REV.1/PART I) SUBMITTED BY THE DELEGATION OF GREECE ON BEHALF OF THE DELEGATIONS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, PORTUGAL, SPAIN AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Article 93

1. ...

2. ...

3. When, in accordance with Article 91, paragraph 2, the bond or other financial security is posted with the detaining State, the Tribunal or Chamber shall, at the request of the flag State, make such determinations as are necessary to ensure the endorsement or reimbursement of the bond or security in the same means of payment in which they were posted with the detaining State according to the final judgment or award of the appropriate domestic forum.

/...

LOS/PCN/SCN.4/1988/CRP.30
30 August 1988

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 15 August-2 September 1988

SUGGESTED REDRAFT OF ARTICLE 91 (LOS/PCN/SCN.4/WP.2/REV.1/PART I) SUBMITTED BY THE DELEGATION OF THE UNITED REPUBLIC OF TANZANIA ON BEHALF OF THE GROUP OF 77

Article 90

Paragraph 1

The Tribunal shall give priority to applications for release of vessels and/or crews and requests for provisional measures over all other cases. As between an application and a request, the degree of priority, if applicable, shall be dealt by the Tribunal bearing in mind the nature, scope and circumstances of such request and application.

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LOS/PCN/SCN.4/1989/CRP.31
9 March 1989
ENGLISH
ORIGINAL: FRENCH

PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Kingston, 27 February-23 March 1989

PROPOSALS SUBMITTED BY FRANCE REGARDING THE DRAFT CONVENTION/PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (LOS/PCN/SCN.4/WP.6)

Article 5: Exemption from taxes and customs duties

Replace subparagraph (a) by the following text:

"(a) From all direct taxes; however, the exemption shall not extend to taxes and charges which constitute payment for services rendered."

Article 6: Reimbursement of duty or tax

In the fourth line of the article, replace "property" by "goods and services".

Article 7: Facilities in respect of communications

Delete the first paragraph of the article.

Article 8: Members of the Tribunal

Replace paragraph 1 by the following text:

"1. Pursuant to annex VI, article 10, of the United Nations Conference on the Law of the Sea, members of the Tribunal shall enjoy, in the exercise of their functions in any country where they may be, the privileges and immunities accorded to diplomatic agents accredited to that country."

/...

Delete paragraph 5, which will be replaced by a new article (see below).

In paragraph 7, add a new sentence reading:

> "The Tribunal alone shall be competent to waive the immunities: it not only has the right but is under a duty to waive the immunity of a member in any case where in the opinion of the Tribunal the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."

Article 9: Representatives of States Parties

Replace paragraph 1 (a) by the following:

> "(a) Immunity from personal arrest or detention except in the case of a flagrant crime or offence and, in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind;".

Delete paragraph 3.

Replace paragraph 6 by the following:

> "The provisions of paragraphs 1, 2 and 3 are not applicable as between the person and the authorities of the State of which he is a national or permanent resident."

[The proposed amendment to paragraph 7 does not apply to the English text.]

Article 10: Agents, counsel and advocates

The words "In particular," should be deleted from the last sentence of the introductory part of paragraph 1. This last sentence will then read:

> "They shall be accorded:"

Delete subparagraphs (a), (b) and (f) of paragraph 1.

Delete paragraph 4.

Insert a new paragraph reading:

> "The provisions of paragraph 1 are not, save for those of subparagraph (b), applicable as between the person and the authorities of the State of which he is a national or permanent resident."

Article 11: Officials

Replace paragraph 1 of the article by the following:

/...

"1. Officials of the Tribunal shall enjoy in any country where they may be on the business of the Tribunal, or in any country through which they may pass on such business, only the following privileges, immunities and facilities for residence and travel necessary for the independent exercise of their functions."

Replace paragraph 5 (a) of the article by the following:

> "(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in the exercise of their functions;".

Delete paragraph 5 (b), which, like article 8, paragraph 5, will be replaced by a new article as indicated below.

In paragraph 5 (e), delete the last phrase:

"in accordance with international law and practice".

In paragraph 5 (g), delete the last phrase:

"and to re-export the same free of duty to their country of domicile".

The first sentence of paragraph 6 of the article should read:

> "Privileges and immunities are granted to officials solely in the interests of the Tribunal and not for the personal benefit of the individuals themselves." (the remainder of the paragraph unchanged).

Article 12: Experts appointed under article 289 of the Convention

The last sentence of the introductory part of paragraph 1 of the article should read:

"They shall be accorded:"

(the words "In particular" are deleted).

Paragraph 1 (a) is replaced by the following:

> "(a) Immunity from personal arrest or detention;"

(the words "and from seizure of their personal baggage" are deleted).

Article 13: Witnesses, experts and persons performing missions

Delete the words "In particular," in the second sentence of paragraph 1.

Replace paragraph 2 by the following:

/...

"Privileges and immunities are granted to witnesses, experts and persons performing missions by order of the Tribunal in the interests of the Tribunal and not for the personal benefit of the individuals themselves. The Tribunal shall have the right and the duty to waive the immunity of any such witness, expert or person performing a mission by order of the Tribunal in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Tribunal."

Article 14: Laissez-passer

/̄ The proposed amendments to paragraphs 1 and 2 do not apply to the English text._/

Article 15: Co-operation with the authorities

Replace the last part of this article by the following:

"... the observance of police regulations and prevent the occurrence of any abuse of the privileges, immunities, exemptions and facilities mentioned in this agreement".

Article 16: Restrictions by a national Government

Add a new subparagraph to paragraph 2. The paragraph as a whole will then read as follows:

"2. Members of the Tribunal and the Registrar shall, in the matter of customs and exchange control, be accorded:

"(a) By their own Government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;

"(b) By the Governments of other members, the same facilities as those accorded to representatives of foreign Governments on temporary official duty."

Add a new paragraph 3 reading as follows:

"Nothing in this agreement shall prejudice the right of the Governments of States Parties to take the measures they deem necessary for their security and the maintenance of public order."

Article 17: Settlement of disputes

/̄ The proposed amendments to paragraphs 1 (a), 1 (b) and 2 of article 17 do not apply to the English text. 7

New article: Taxation

"The salaries, emoluments and allowances paid to members and officials of the Tribunal shall be exempt from income tax from the date on which such salaries, emoluments and allowances become subject to an effective tax levied by the Tribunal on its own account.

/...

"The Parties to the protocol may take such salaries, emoluments and allowances into account in calculating the amount of the tax to be levied on income from other sources. They shall not be obliged to exempt from income tax pensions or annuities paid to former members and former officials of the Tribunal."

/...

LOS/PCN/SCN.4/1989/CRP.32
14 March 1989

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Kingston, 27 February-23 March 1989

SUGGESTED REDRAFT OF ARTICLE 93 (LOS/PCN/SCN.4/WP.2/REV.1/PART I) SUBMITTED BY THE DELEGATION OF JAPAN

Article 93

1 The Registrar shall endorse or transmit the bond or other financial security posted with the Tribunal or as directed by it, to the detaining State upon communication of the final judgement or award of the appropriate domestic forum against the vessel, its owner or its crew to the extent that it is necessary to satisfy such judgement or award or upon communication that the final judgement or award is not made owing to the failure of the accused to appear in the domestic forum.

2. The bond or other financial security, to the extent that it is not necessary to satisfy the judgement or award, shall be endorsed or transmitted in favour of the flag State or its authorized representative.

3. When, in accordance with article 91, paragraph 2, the bond or other financial security is posted with the detaining State, the Tribunal or Chamber shall, at the request of the flag State, make such determinations as are necessary to ensure the endorsement or reimbursement of the bond or security in the same means of payment in which they were posted with the detaining State to the extent that it is not necessary to satisfy the judgement or award, unless it is not made owing to the failure of the accused to appear in the domestic forum.

/...

LOS/PCN/SCN.4/1989/CRP.33
21 March 1989

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Kingston, 27 February - 23 March 1989

SUGGESTED ARTICLE 14 bis (LOS/PCN/SCN.4/WP.6) SUBMITTED BY THE DELEGATION OF THE UKRAINIAN SOVIET SOCIALIST REPUBLICS

Article 14 bis

Without prejudice to their privileges and immunities, it is the duty of all persons referred to in articles 8-13, to respect the laws and regulations of the State-party in which they exercise official functions. They also have a duty not to interfere in the internal affairs of that State.

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LOS/PCN/SCN.4/1989/CRP.34
16 August 1989
ENGLISH

ORIGINAL: FRENCH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY AND
FOR THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Special Commission 4
New York, 14 August-1 September 1989

Belgium: Proposals relating to the draft Convention on the privileges and immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6)

Article 2

Property, funds and assets

1. The Tribunal shall enjoy immunity from legal process and execution in connection with its official activities, except in so far as in any particular case it has expressly waived its immunity.

2. The property and assets of the Tribunal, wheresoever located, shall be immune from search, requisition, confiscation, expropriation or any other form of interference, whether by administrative or judicial action.

3. The premises of the Tribunal used in the exercise of its functions shall be inviolable.

4. Paragraphs 1 and 2 of this Article notwithstanding, the Tribunal shall not enjoy immunity from legal process or execution:

(a) In the event of a civil action instituted by a third party for damage or injury occurring in an accident caused by a motor vehicle or other means of transport belonging to the Tribunal or driven on its behalf, or in the event of an

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infraction of the motor vehicle traffic regulations involving a vehicle as described above;

(b) With respect to its commercial activities.

Article 17

Settlement of disputes

1 (a): Add and in respect of which the Tribunal enjoys immunity in accordance with Article 2.

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LOS/PCN/SCN.4/1989/CRP.35
16 August 1989

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL SEA-BED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 14 August-1 September 1989

SUGGESTED ARTICLE 16 bis (LOS/PCN/SCN.4/WP.6) SUBMITTED BY THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY

Article 16 (bis)

Abuses of privileges and immunities

1. If any State Party considers that there has been an abuse of a privilege or immunity conferred by this Protocol, consultations shall be held between that State and the Tribunal to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. If such consultations fail to achieve a result satisfactory to the State and the Tribunal, the question whether an abuse of a privilege or immunity has occurred shall be submitted to the arbitral tribunal referred to in article 17 of this Protocol. If the arbitral tribunal finds that such an abuse has occurred, the State Party affected by such abuse shall have the right, after notification to the Tribunal to withhold from the Tribunal the benefits of the privilege or immunity so abused.

2. Representatives of States Parties, including agents, counsel and advocates designated by States Parties, while exercising their functions and during their journeys to and from the place of meeting, and officials within the meaning of article 11 shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity. In the case, however, of abuse of privileges of residence committed by any such person in activities in that country outside his official functions, he may be required to leave by the Government of that country provided that:

(a) Representatives of States Parties or persons who are entitled to diplomatic immunity shall not be required to leave the country otherwise than in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country;

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(b) In the case of an official to whom article 11 is not applicable, no order to leave the country shall be issued other than with the approval of the Minister for Foreign Affairs of the country in question, and such approval shall be given only after consultation with the Registrar of the Tribunal and, if expulsion proceedings are taken against an official, the Registrar of the Tribunal shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.

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LOS/PCN/SCN.4/1989/CRP.36
28 August 1989

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY AND
FOR THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Special Commission 4
New York, 14 August-1 September 1989

Indicative list of issues specific to relationship agreements between the International Tribunal for the Law of the Sea and the United Nations, the International Sea-Bed Authority, the International Court of Justice and Specialized Agencies of the United Nations with relevant competences

(*Note by the Secretariat*)

The following is an indicative list of issues that have to be regulated in relationship agreements between the Tribunal and the United Nations, the International Sea-Bed Authority and the International Court of Justice. The Tribunal should be free to regulate further areas of co-operation not covered by the list.

1. Specific issues requiring inclusion in a relationship agreement between the Tribunal and the United Nations:

(a) Matters of co-operation related to the functions of the Secretary-General of the United Nations as depositary of the United Nations Convention on the Law of the Sea. It appears appropriate for the Tribunal to receive, in connection with the fulfilment by the Secretary-General of his function as depositary, all information that is received from States parties to the Convention;

(b) Arrangements for the Members, officials and other functionaries of the Tribunal to use the laissez-passer of the United Nations;

(c) Extension of the United Nations Joint Staff Pension Fund to the Members, officials and other functionaries of the Tribunal;

(d) Maintenance and exchange of statistical information and data;

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(e) Co-operation with the United Nations Security Council with regard to information on disputes in respect of which the Security Council is exercising the functions assigned to it by the Charter of the United Nations (article 298 (1) of the Convention);

(f) Other matters for co-operation arising from additional functions of the Secretary-General, under article 319 of the Convention (see annex).

2. Specific issues to be regulated in a relationship agreement between the Tribunal and the International Sea-Bed Authority:

(a) Consultations and arrangements for the assessment and payment of the contribution of the International Sea-Bed Authority to the budget of the Tribunal (Annex VI, article 19 of the Convention);

(b) Information to the Tribunal by the International Sea-Bed Authority on rules, regulations and procedures of the Authority adopted in accordance with the Convention and any general terms of contracts concerning activities in the Area;

(c) Statistical services;

(d) Functions of the Secretary-General of the Authority, such as:

(i) Consultation and co-operation with international and non-governmental organizations (NGOs) (article 169);

(ii) Notification of suspension of the exercise of voting rights (article 184);

(iii) Notification of exercise of rights and privileges of membership (article 185).

3. Specific issues to be regulated in a relationship agreement between the Tribunal and the International Court of Justice:

(a) Exchange of information between the Tribunal and the International Court of Justice on their judicial practice since both have competence for the settlement of disputes relating to the law of the sea (articles 287 and 290 (5) of the Convention).

4. Issues of a general nature to be regulated in the relationship agreements with all three of the above-mentioned institutions and possibly with additional international bodies:

(a) Uniform administrative, budgetary and financial arrangements;

(b) Uniform personnel policies;

(c) Fulfilling the requirements of article 2 of Annex VIII which entrusts the specialized organizations to draw up and maintain lists of experts in the specialized fields. They may function as experts under article 289 of the Convention. The specialized organizations are:

(i) Food and Agriculture Organization of the United Nations (FAO), in the field of fisheries;

(ii) United Nations Environment Programme (UNEP), in the field of the protection and preservation of the marine environment;

(iii) the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the field of marine scientific research;

(iv) International Maritime Organization (IMO), in the field of navigation, including pollution from vessels and by dumping.

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Annex

ADDITIONAL FUNCTIONS OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

1. Reporting on issues of a general nature that have arisen with respect to the Convention (article 319, para. 2 (a)).

2. Notification to States parties, etc. of ratifications and formal confirmations and accessions to the Convention and amendments thereto, as well as denunciations of the Convention (article 319, para. 2 (b)).

3. Notification to States parties, etc., of agreements in accordance with article 311, paragraph 4.

4. Convening of necessary meetings of States parties (article 319, para. 2 (e)).

   (a) Meeting of the States parties in accordance with paragraph 10 of resolution I of the Third United Nations Convention on the Law of the Sea.

   (b) Meetings of the States parties in the case of the first and subsequent elections of the Members of the Tribunal (Annex VI, article 4, para. 4).

   (c) Meetings of the States parties (Annex VI, article 19, para. 1).

5. Invitation of observers to meetings of States parties (article 319, para. 3 (b)).

6. Acting as depositary of charts and lists of geographical co-ordinates (articles 16 (2), 47 (9), 75, 84 and 134 (3) and (4).

7. Receipt of notifications concerning choice of dispute settlements procedures (articles 287 and 292 (1).

8. Notification of choice of procedure (articles 287 and 292 (1)).

9. Receipt of notices of optional exceptions (article 298).

10. Notification of information on optional exceptions (article 298).

11. Notification of list of conciliators and reports (Annex V, articles 2 and 7).

12. Notification of list of arbitrators (Annex VII, article 2).

13. Notification of lists of experts (Annex VIII, article 2).

14. Notification of the composition of the Commission on the Limits of the Continental Shelf (Annex II, article 2).

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15. Other functions in connection with providing the secretariat of the Commission on the Limits of the Continental Shelf (article 2, para. 5, Annex II).

16. Information in connection with decisions of the General Assembly, such as information on national legislation (see A/37/561, para. 13).

17. Servicing the meetings of the States parties (see A/37/561, paras. 15 and 17-19).

18. Reporting on developments relevant to the new legal régime for the seas and information activities (see A/37/561, para. 16).

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LOS/PCN/SCN.4/1989/CRP.37
29 August 1989

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 14 August-1 September 1989

SUGGESTED REDRAFT OF ARTICLE 90, PARAGRAPH 1, AND ARTICLE 93 (LOS/PCN/SCN.4/WP.2/Rev.1/Part I) SUBMITTED BY THE DELEGATION OF THE UNITED REPUBLIC OF TANZANIA ON BEHALF OF THE GROUP OF 77; THE DELEGATION OF FRANCE ON BEHALF OF THE DELEGATIONS OF BELGIUM, DENMARK, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, PORTUGAL, SPAIN AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND; THE DELEGATION OF JAPAN; AND THE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS

Article 90

1. The Tribunal shall give priority to applications for release of vessels and/or crews and to requests for provisional measures over all other cases. When the Tribunal is seized simultaneously of an application for release of vessels and/or crews and of a request for provisional measures, it shall take the necessary decisions to ensure that both the application and the request shall be settled without delay.

Article 93

1. The Registrar shall endorse and/or transmit the bond or other financial security posted with the Tribunal or as directed by it, to the detaining State upon communication of the final judgement, award or decision of the competent domestic forum or authority against the vessel, its owner or its crew to the extent that it is required to satisfy such judgement or award.

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2. The bond or other financial security, to the extent that it is not required to satisfy the judgement or award, shall be endorsed and/or transmitted in favour of the flag State or its authorized representative.

3. The Tribunal or Chamber shall, at the request of the flag State or the detaining State, as the case may be, take the necessary determinations for the bond or security to:

(a) Be endorsed or released by the same means of payment in which the bond or other financial security was posted with the detaining State to the extent that it is not required to satisfy the final judgement or award of the appropriate domestic forum; or

(b) Be supplemented to the extent that it is required to satisfy the final judgement or award of the appropriate domestic forum.

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LOS/PCN/SCN.4/1990/CRP.38
23 March 1990

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Eighth session
Kingston, Jamaica
5-30 March 1990

Informal proposal of the Bureau

Organization of the future work of Special Commission 4

1. In preparation of the report containing recommendations for submission to the Meeting of the States Parties to be convened in accordance with annex VI, article 4 of the Convention regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea, Special Commission 4 should still consider the following subjects:

- Administrative arrangements, structure and financial implications for the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.8);
- Relationship arrangements between the United Nations and the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.9 and Add.1);
- Elements of supplementary arrangements between the International Tribunal for the Law of the Sea and the International Court of Justice;
- Elements of relationship agreement between the International Tribunal for the Law of the Sea and the International Sea-Bed Authority.

2. The examination of the above matters should be completed during the eighth session.

3. The following matters will be taken up at subsequent sessions:

- Principles to govern the financial rules of the International Tribunal for the Law of the Sea;

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- Principles to govern the staff regulations of the International Tribunal for the Law of the Sea;
- Principles to govern the rules of procedure for the Meeting of the States Parties;
- If time permits, review of the redrafts of the Headquarters Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany, and of the Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea;
- Consideration of the building requirements and facilities for the seat of the International Tribunal for the Law of the Sea and report of the host country on the progress of work in this respect; other issues related to the seat of the Tribunal may be considered in this context;
- As the last item of its agenda the Special Commission should take up the draft report containing recommendations for submission to the Meeting of the States Parties regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.

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LOS/PCN/SCN.4/1991/CRP.39
8 March 1991

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Ninth session
Kingston, Jamaica
25 February-22 March 1991

STATUS OF WORK IN THE SPECIAL COMMISSION 4

Resolution I charges the Preparatory Commission with making the necessary arrangements for the functioning of the International Tribunal for the Law of the Sea, as an autonomous body, separate and distinct from the Authority. With regard to the Tribunal, the Preparatory Commission is required to prepare a report containing recommendations "regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea", (resolution I, para. 10). The key to these arrangements is the qualifying word "practical". It follows therefore that practical measures to be taken for the Tribunal to be functional soon after entry into force of the Convention need to be reviewed and reported on. [see also PCN/SCN.4/WP.1, para. 1]

The report is to be presented to the Meeting of State Parties to be convened within six months of the entry into force of the Convention by the Secretary-General of the United Nations. That first Meeting is primarily intended for the election of members of the Tribunal (Annex VI, article 4). By the time of the Meeting, the Convention may have been in force for nearly six months. Furthermore, the Meeting of the States Parties would be an inter-governmental and plenipotentiary meeting. For the purposes of elections, it would only need to meet every three years.

The Convention does not seem to contemplate that it would function as a negotiating body. It is not contemplated to be a periodic conference either. The Special Commission may wish to determine whether it should take the additional time needed to draft and elaborate all rules for the functioning

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of the Meeting of States Parties and for the functioning of the Tribunal. An assessment may be made, also in the context whether it would be efficient for the States Parties' Meeting to formulate practical arrangements for the Tribunal by establishing different committees that would look into these matters. One may assume that such an approach would not only be costly for the States Parties and the Tribunal's budget but it would require sessions with frequent meetings. The Meeting of the State Parties is not visualized as being similar to the Assembly of the Authority.

It may be assumed therefore that the work of the Preparatory Commission should proceed to the point where it has reviewed and assessed all matters. Only then could it be able to present a report that provides comprehensive recommendations and options that would facilitate decision-making by the States Parties' Meeting and allow for negotations only on the most important issues. It follows that the several other documents and materials, in addition to those draft texts already prepared and discussed in Special Commission 4, could also be prepared for easy review and adoption. They may thus not have to be negotiated or discussed again in another plenipotentiary body. When looking into the issues raised the Special Commission should take into account its previous decisions relative to the programme of work.

The series of working papers and draft proposals before the Commission have gone through different degrees of review. Given these perspectives, the situation regarding the work to be completed by Special Commission 4 is seen to be as follows:

1. Procedural

(a) Rules of procedure of the Tribunal (LOS/PCN/SCN.4/WP.2 and Rev.1, Parts I and II

The adoption of these rules by the Tribunal is key to its early functioning. Although this document has been reviewed and a revision (LOS/PCN/SCN.4/WP.2/Rev.1/Parts I and II) presented and discussed, there were many opinions expressed by delegations regarding the first revision. It has been decided by the Special Commission that a second revision should be made by the Secretariat. The Special Commission may wish to conduct a final review, if time permits. [see also LOS/PCN/SCN.4/WP.1, Section VII]

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(b) Principles to govern the rules of procedure for the Meeting of States Parties

As a Plenipotentiary Conference, the Meeting of the States Parties would need to have its own rules of procedure to conduct its business as expeditiously as possible. At the eighth session of the Preparatory Commission in Kingston, an understanding was reached that documentation on this issue would be prepared by the Secretariat for consideration by the Meeting of States Parties, and the Special Commission would not examine the content of that documentation. But in exercising its mandate, the Special Commission may wish to decide how we should deal with this, especially taking into account article 4, paragraph 4 of Annex VI which *inter alia* envisages the establishment by the Meeting of States Parties the procedure for holding elections for Members of the Tribunal. The States Parties' Meeting may benefit from having the views of the Special Commission on this subject in order to avoid protracted negotiations and to take early decisions. [see also LOS/PCN/SCN.4/WP.1, Section VII]

2. International Agreements/Protocols

(a) Revised Draft Protocol on the Privileges and Immunities for the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6 and Rev.1)

The Protocol has been prepared and discussed by the Special Commission and a revision of that paper, taking into consideration suggestions, amendments and proposals made by delegations during the course of the discussions, has been prepared by the Secretariat and is currently under review by the Special Commission at this session. It was, however, requested of the Secretariat to harmonize the Protocol with the Headquarters Agreement between the International Tribunal for the Law of the Sea and the host country. This request is still pending as the Secretariat is awaiting the conclusion of discussions on the revised Protocol. [see also LOS/PCN/SCN.4/WP.1, para. 3(ii)]

(b) Revised Draft Headquarters Agreement Between the International Tribunal for the Law of the Sea and the Host Country (LOS/PCN/SCN.4/WP.5 and Rev.1/Parts I and II)

This document, LOS/PCN/SCN.4/WP.5 and its Revision, Parts I & II, have also been reviewed. The Special Commission has requested the Secretariat to prepare a second revision of this document. It needs to be harmonized with the

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Draft Protocol on Privileges and Immunities of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.6), the revision of which is currently under review. The revision of the Draft Headquarters Agreement can only take place thereafter. The Secretariat has also to take into consideration the amendments and suggestions put forward by delegations during the discussions on these matters and to find compromise formulations for issues on which there was no agreement. [see also LOS/PCN/SCN.4/WP.1, para. 3(ii)]

3. Arrangements with other International Organizations

The Special Commission had requested the Secretariat to prepare the following relationship arrangements for the International Tribunal for the Law of the Sea. [see also LOS/PCN/SCN.4/WP.1, para. 6]

(a) Relationship arrangements between the United Nations and the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.9 and Add.I)

This Draft Agreement has been prepared and discussed by the Special Commission. A revision of that paper, taking into consideration suggestions, amendments and proposals made by delegations during the course of the discussions, with solutions to be provided by the Secretariat on matters where there was no agreement, has yet to be prepared by the Secretariat. The Special Commission may wish that it would be reviewed before its inclusion in the Final Report. [see also LOS/PCN/SCN.4/WP.1, para. 8]

(b) Principles governing relationship arrangements between the International Sea-Bed Authority and the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.10)

This working paper presented by the Secretariat was discussed by the Special Commission and a revision of that document has been requested of the Secretariat. It may seem to be appropriate that this be discussed jointly with the Plenary on the Authority before a final version can be prepared. [see also LOS/PCN/SCN.4/WP.1, para. 10]

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(c) Elements of supplemental arrangements between the International Tribunal for the Law of the Sea and the International Court of Justice

This document still has to be prepared by the Secretariat. In preparing this document, the Secretariat needs to consult with the Registry and the International Court of Justice. It would therefore need time to hold the necessary consultations and to prepare the draft. [see also LOS/PCN/SCN.4/WP.1, para. 9]

4. Administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea (LOS/PCN/SCN.4/WP.8 and Adds. 1 and 2).

Three working papers have been prepared by the Secretariat relating to this subject. Document LOS/PCN/SCN.4/WP.8 deals with the structure of the Tribunal and financial implications for a functional Institution, using two official working languages with judgements and pleadings to be issued later as unofficial translations in the other four working languages of the United Nations; document LOS/PCN/SCN4/WP.8/Add.1 deals with the implications in the situation where the Tribunal would have to use more than two working languages or less than two working languages; document LOS/PCN/SCN4/WP.8/Add.2 deals with the scheme to phase in the establishment of the International Tribunal for the Law of the Sea. The first two documents have been preliminarily discussed by the Special Commission. The Special Commission is currently considering document WP.8/Add.2 dealing with the phasing-in of the establishment of the Tribunal. In discussing the document, delegations are considering the two previous documents dealing with structure and financing of the Tribunal and the issue of the working languages and the geographic representation of Members in the alternative schemes for phasing in the Tribunal. After conclusion of the discussions on these papers the Secretariat would have to prepare a revision combining the relevant elements found in the three working papers mentioned above and also taking into consideration suggestions and proposals which would be made by delegations in this regard. [see also LOS/PCN/SCN.4/WP.1, para. 18]

5. Initial and subsequent financing of the Tribunal

The initial financing of the Tribunal and the subsequent budgetary arrangements are matters of primary importance, since the Tribunal cannot be established until these arrangements are in place. The alternatives for initial financing would include either a reimbursable or a non-reimbursable

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loan for which the precedent has been that either a government or an international organization has provided the loan. The United Nations has done so in instances when an agency is established. The establishment of the Tribunal requires prior arrangements for its financing. If the issue is left to the Meeting of States Parties it can be protracted. It would seem to be necessary for the Special Commission to review the alternatives and make recommendations thereon.

The Special Commission may also have to consider the issue of the adoption of the biennial budget. This would depend on how and when the budget process would call for reporting to the Meeting of States Parties or such other body as would review the budget. Besides this, the first annual budget would need to be adopted by the Meeting of States Parties.

The additional and perhaps the most controversial issue will be the adoption of the scale of assessments. While a very preliminary discussion has taken place with Special Commission 4 on this issue, the matter is a complex one and may require discussion and evaluation of alternatives. The Special Commission may also wish to flag the adoption of the scale of assessments for the Meeting of States Parties.

Since the International Tribunal for the Law of the Sea would be an autonomous international judicial body, the Preparatory Commission may find it appropriate to include in its Report its recommendations with alternative approaches to the initial funding for the activities for the Tribunal and a mechanism for providing such funds. The Secretariat should therefore prepare the necessary background papers, and perhaps a working paper outlining the schemes or alternatives as to the initial funding of the Tribunal. This may need to be discussed by the Special Commission and revised on the basis of comments, ideas and suggestions made by delegations during the discussions. [see also LOS/PCN/SCN.4/WP.1, Section IV. paras. 16-17]

6. Internal administration (draft financial rules and staff regulations)

The Special Commission has requested the Secretariat to prepare documentation relating to the principles to govern the financial rules and staff regulations of the Tribunal. Some aspects of internal administration of the Tribunal might also be highlighted in the Special Commission. [see also LOS/PCN/SCN.4/WP.1, Section V, para. 18 and Section VI, para. 19]

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7. Building and Equipment Requirements

The Special Commission would have to consider the building requirements and facilities for the Seat of the International Tribunal for the Law of the Sea. In this context, there have been reports of the Host country on the progress of work in its preparations. The host country has conducted much preliminary work and has reviewed the specifications and needs of the Tribunal based on the experience of the United Nations, its agencies and bodies.

This has been the basis for the specifications provided for the international architectural competition conducted by the host country. The host country is expected to present, at the current session of the Preparatory Commission, a report on these matters. The Special Commission thereafter could determine how it should proceed to deal with questions relating to the building, equipment and facilities. [see also LOS/PCN/SCN.4/WP.1, Section I, para. 7]

8. Consultations regarding the seat of the Tribunal

Under the programme of work already approved by the Special Commission and reflected in the Chairman's Report, LOS/PCN/L.86, the consultations on the questions relating to the seat which have been conducted by the Chairman, with a view to coming to a generally acceptable solution, would need to be continued and concluded.

9. Report of the Special Commission

Since there has been no discussion in the Preparatory Commission as to the form and content of the Final Report, the Special Commission may need to look into this issue. This report, to be presented to the first Meeting of States Parties, would be separate from the report that would be prepared by the Preparatory Commission and presented to the Assembly of the International Sea-Bed Authority. In view of the number of documents which would have been considered by the Special Commission, some time would seem to be required for the preparation and consideration of this report by the Special Commission before it is presented to the Plenary. [see also LOS/PCN/SCN.4/WP.1, para. 1]

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LOS/PCN/SCN.4/1991/CRP.40
15 March 1991

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Ninth session
Kingston, Jamaica
25 February-22 March 1991

REPORT ON THE PROGRESS OF WORK DATED 13 MARCH 1991 CONCERNING THE BUILDING REQUIREMENTS AND FACILITIES FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA IN HAMBURG

STATEMENT OF THE PARLIAMENTARY STATE-SECRETARY, H.E. MR. RAINER FUNKE, MINISTRY OF JUSTICE OF THE FEDERAL REPUBLIC OF GERMANY

It is both an honour and a pleasure for me to take the floor before such a distinguished forum of experts in the Law of the Sea which is Special Commission 4 of the Preparatory Commission. From its very beginning I have been following with great interest the work of the Preparatory Commission in which I have participated as Parliamentary Advisor of the German Delegation several times.

As you know, the German Delegation submitted its last comprehensive report on the preliminary activities for the establishment of the International Tribunal for the Law of the Sea in Hamburg, in March 1987. 1/ In the same year the Staffing and Accommodation Plan proposed by the Federal Republic of Germany was reviewed in collaboration with the United Nations. The Chairman reported on the visit of Secretariat members to the Federal Republic of Germany already on 21 March 1988. 2/

Those plans constituted an essential basis for the international architectural competition announced in 1989. 3/ Twenty internationally renowned architects from Germany and abroad were invited to participate in the single-stage anonymous competition. The number of architects from the Federal Republic of Germany was equal to that of architects from other countries. The architects' task was to develop a building design characterized by outstanding external and internal architectural features suitable to make the International Tribunal for the Law of the Sea an ideal setting for international litigation. The fifteen designs submitted were evaluated by a jury composed of seven specialist judges and six expert judges. Among the expert judges were the United Nations Under-Secretary-General, Mr. Satya N. Nandan and Mr. Gritakumar E. Chitty, Secretary of Special Commission 4. 4/ The jury awarded the first prize to the architects Baron Alexander and Baroness Emanuela von Branca. The decision of the jury was presented in Hamburg and Bonn in September 1989 and in October 1989 in New York. On the basis of the jury's pronouncement, the architects von Branca submitted a revised design in May 1990.

The competition has been documented in a brochure which was presented by the German delegation to the eighth session of the Preparatory Commission. The brochure can be made available once more to interested delegations.

The clear order of priority established by the jury constitutes the basis for decisions concerning further activities.

Pursuant to the guidelines laid down for the execution of construction work in the Federal Republic of Germany, further planning activities are incumbent on the Regional Finance Office, Hamburg, in co-operation with the local Building Department.

The preparation of the budgetary document for the construction was begun in early 1990. This document constitutes the basis for the allocation of budgetary funds to construction work. It contains information on the execution of construction work such as a site plan, building plans and explanatory statements, namely description of building specifications and technical equipment, as well as necessary expenditure. This document is binding on further planning activities.

A first draft of the budgetary document has since been elaborated with the von Branca architects' office. The recommendations formulated by the jury, the United Nations, the Federal Ministry of Justice and the Federal Ministry for Regional Planning, Building and Urban Development have been given due consideration in this draft.

As soon as the consultations have been concluded within the Government of the Federal Republic of Germany, it is intended to consult the competent United Nations authorities on the said draft, presumably in the autumn of 1991.

The high political priority attached to the establishment of the International Tribunal for the Law of the Sea, particularly by the Free and Hanseatic City of Hamburg, is documented, inter alia, by the creation in 1989 of a Board for the promotion of Hamburg as the seat of the Tribunal. The Board was set up by prominent personalities in public life, its members include ex-Chancellor Helmut Schmidt, Parliamentary State Secretary Echternach and First Mayor Voscherau. May I say that I am also a member of this Board as are other members of the German delegation, like Mr. Dietmar Schütz, who is also Member of our Parliament, and Dr. Renate Platzöder. Let me assure you that in my present function as Junior Minister I shall do my best so that the Tribunal can take up its work in Hamburg at the earliest possible date.

1/ LOS/PCN/SCN.4/L.8 OF 13 March 1987.

2/ LOS/PCN/SCN.4/L.12 of 21 March 1988.

3/ A/43/718 of 20 October 1988.

4/ The jury included Mr. Patrick O. Stanigar of Jamaica and Mr. C. Charles Wright of the United Nations Overseas Property Unit as specialist judges.

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LOS/PCN/SCN.4/1991/CRP.41
16 August 1991
ENGLISH
ORIGINAL: ENGLISH AND FRENCH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY AND
FOR THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Special Commission 4
New York, 12-30 August 1991

PROPOSALS SUBMITTED BY SWITZERLAND REGARDING THE REVISED DRAFT PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(LOS/PCN/SCN.4/WP.6/Rev.1)

Article 14

Witnesses, experts and persons performing missions

1. Replace paragraph 2 by

On journeys in connection with the accomplishment of their missions, expert witnesses, witnesses and persons performing missions by order of the Tribunal enjoy such immunities as may be required to ensure their transit or return.

Article 16

Waiver

2. Paragraph 4, lines 4 and 5

Replace a unanimous decision which shall include a two-thirds majority of its Members by a unanimous decision of its Members present, which shall include a two-thirds majority of its Members.

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LOS/PCN/SCN.4/1991/CPR.42
22 August 1991
ENGLISH
ORIGINAL: FRENCH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 12-30 August 1991

PROPOSAL BY SWITZERLAND CONCERNING THE REVISED DRAFT PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (LOS/PCN/SCN.4/WP.6/Rev.1)

Replace the title of article 21 with:

Free movement

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LOS/PCN/SCN.4/1991/CRP.43
27 August 1991

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEABED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 12-30 August 1991

REVISED DRAFT PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(LOS/PCN/SCN.4/WP.6/Rev.1)

Redraft of Pending Articles

(Submitted by the Secretariat)

Article 3

Inviolability of the premises of the Tribunal

The premises of the Tribunal shall be inviolable.

Article 3.bis

Immunity of the Tribunal, its property and assets

1. The Tribunal shall enjoy immunity from legal process and execution in connection with its activities, except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

2. The property and assets of the Tribunal wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of interference, whether by administrative, judicial or legislative action.

3. The property and assets of the Tribunal shall be exempt from restrictions, regulations, controls and moratoria of any nature.

4. The immunity referred to in paragraphs 1 and 2 shall not extend to an action for damages arising from an accident involving a vehicle the use of which may have entailed the liability of the Tribunal to the extent that those damages are not recoverable from insurance. Pursuant to the laws and regulations of the host country, or the transit State, the Tribunal shall be required to have insurance coverage against third-party risks in respect of vehicles owned or operated by it.

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Article 4
Exercise of the functions of the Tribunal outside the host country

1. In the event that the Tribunal will sit and exercise its functions in accordance with Article 1, paragraph 3, of Annex VI of the Convention:

(a) The State Party concerned shall provide the appropriate facilities in accordance with international practice and upon request by the Tribunal the State Party shall, as soon as possible, conclude an arrangement with the Tribunal covering such matters;

(b) In the case where the State concerned is not a State Party, the Tribunal shall conclude with such State an arrangement concerning the provision of the appropriate facilities for the efficient exercise of its functions in accordance with international practice as well as the accord of privileges, immunites, facilities and prerogatives in accordance with this Protocol.

Article 4.bis
Ad hoc adherence to the Protocol by a party to a dispute

2. Where a dispute has been submitted to the Tribunal in accordance with its Statute, any State other than a State Party to the Convention which is a party to the dispute may, ad hoc for the purposes and duration of the proceedings relating thereto, become a party to this Protocol by the deposit of its instrument of adherence.

Article 8
Reimbursement of duties and/or taxes

The Tribunal shall not, as a general rule, claim exemption from duties and taxes which are included in the price of movable and immovable property and taxes paid for services rendered. Nevertheless when the Tribunal for its official use makes major purchases of property and goods or services on which duties and taxes are charged or are chargeable, States Parties shall make appropriate administrative arrangements for the reimbursement of the amount of duty or tax.

Article 10
Members and Ad Hoc Members of the Tribunal

1. Members of the Tribunal, while exercising their functions in the territory of each State Party, shall, pursuant to article 10, Annex VI of the Convention, enjoy privileges, immunities and facilities as are accorded to heads of diplomatic missions accredited to that country. Such treatment shall include the privileges, immunities, facilities and prerogatives accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961 and international law.

/...

2. Members of the Tribunal and their spouses, dependant relatives and others forming part of their households, shall be accorded every facility for leaving the country where they may happen to be and for entering and leaving the country where the Tribunal is sitting. On journeys in connection with the exercise of their functions, they shall in all countries through which they may have to pass enjoy all the privileges, immunities and facilities granted by these countries to diplomatic agents.

3. Members of the Tribunal, when holding themselves at the disposal of the Tribunal for the exercise of their functions, and their spouses, dependant relatives and others forming part of their households, shall be accorded diplomatic privileges and immunities during the period of their residence in any country other than that of which they are nationals or permanent residents, provided that in their own country or in any country of which they are permanent residents they enjoy privileges, immunities and facilities to the extent admitted by such State. The States concerned, however, must exercise their jurisdiction over those persons in such a manner as not to interfere with the functions of the Tribunal.

4. In order to secure, for Members, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer Members of the Tribunal or performing those duties.

5. Members shall be given, together with their spouses, dependant relatives and others forming part of their households, the same repatriation facilities in time of international crises as diplomatic agents are given under the Vienna Convention on Diplomatic Relations of 18 April 1961 and international law.

6. Privileges, immunities and prerogatives are accorded to the Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the Tribunal.

7. This article shall apply to Members even after the expiry of their terms of office if they continue to exercise their functions. It shall also apply mutatis mutandis to Members ad hoc.

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LOS/PCN/SCN.4/1991/CRP.44
28 August 1991

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEABED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
New York, 12-30 August 1991

REVISED DRAFT PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(LOS/PCN/SCN.4/WP.6/Rev.1)

Redraft of Article 12

(Submitted by the Secretariat)

Article 12
Officials

1. Officials of the Tribunal shall enjoy in any country where they may be on the business of the Tribunal, or in any country through which they may pass on such business, such privileges, immunities and facilities for residence and travel as may be necessary for the independent exercise of their functions.

2. The Registrar and any official of the Tribunal, acting as Registrar, should, while on the business of the Tribunal, be accorded diplomatic privileges and immunities.

3. The Registrar will specify the categories of officials to which the provisions of this Article shall apply. He shall submit these categories to the Tribunal. These categories shall also be communicated to the Governments of all States Parties. The names of the officials included in these categories shall from time to time be communicated to the Governments of States Parties.

4. Officials of the Tribunal shall:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) be exempt from income tax on the salaries and emoluments paid to them by the Tribunal consistent with the established practice of the United Nations*;

(c) be immune from national service obligations;

(d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

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* The UN staff rules and regulations make provision for a staff assessment.

/...

(e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned in accordance with international law and practice;

(f) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as diplomatic envoys are given under international law and the Vienna Convention on Diplomatic Relations adopted on 18 April 1961;

(g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question and to re-export the same free of duty to their country of domicile.

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LOS/PCN/SCN.4/1992/CRP.45
6 March 1992

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEABED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Tenth session
24 February-13 March 1992

SUGGESTED REDRAFT OF ARTICLE 32* IN DOCUMENT LOS/PCN/SCN.4/WP.5/Rev.1

(Submitted by the Secretariat)

Article 32

ENTRY·INTO FORCE

This Agreement shall enter into force, following its signature on behalf of the International Tribunal for the Law of the Sea and on behalf of the Federal Republic of Germany, thirty days after the Federal Republic of Germany has notified the President of the Tribunal that the internal constitutional requirements for the entry into force of this Agreement have been fulfilled.

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* To replace article 32, paras. 1 and 2.

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LOS/PCN/SCN.4/1992/CRP.46
10 March 1992
ENGLISH
ORIGINAL: FRENCH

PREPARATORY COMMISSION FOR THE INTERNATIONAL
SEABED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Tenth session
Kingston, Jamaica
24 February-13 March 1992

PROPOSED AMENDMENTS TO ARTICLE 1 (d) AND ARTICLE 23 (1) OF DOCUMENT LOS/PCN/SCN.4/WP.6/Rev.1

(Proposed by the delegation of Senegal)

Article 1 (d)

Use of terms

(d) "States Parties" means those States which have completed the formalities for accession prescribed in article 23.

Article 23

Final provisions

1. This protocol is open to every State Party to the Convention for accession.

LOS/PCN/SCN.4/1993/CRP.47
1 February 1993

ORIGINAL: ENGLISH

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Eleventh session
Kingston, Jamaica
22 March-2 April 1993

COMMENTS SUBMITTED BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES ON THE DRAFT OUTLINE FOR REPORT OF THE PREPARATORY COMMISSION CONTAINING RECOMMENDATIONS REGARDING PRACTICAL ARRANGEMENTS FOR THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

(LOS/PCN/SCN.4/WP.14)

The European Community and its member States consider the report a useful summary of progress achieved in Special Commission 4. However, the following comments are offered on points of detail, as follows:

1. Chapter I, section 6, page 8: There is no need for a resolution about access by States not parties to the Convention since this matter is governed by Article 19 (2) and Article 20 (2) of the Statute of the Tribunal.

2. Chapter II, section 1, page 6: Given the status of the draft Headquarters Agreement and the draft Relationship Agreement (chap. III, sect. 1, p. 11), the draft text should be qualified in both cases as "formulated" by the Preparatory Commission instead of "approved" in one case and "formulated" in the other.

3. Chapter V, section 2, page 15: The Meeting of the States Parties should "take note of" (and not "approve") the appropriate arrangements.

4. In several places, the draft outline makes reference to texts which do not exist at present. Examples are to be found on:

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- Page 9, paragraph 2;
- Page 10, paragraph 3;
- Page 10, paragraph 5;
- Page 11, last paragraph;
- Page 12, paragraph 4;
- Page 13 (end);
- Page 14, last paragraph;
- Page 15, first paragraph.

It should be made clear, e.g. in footnotes, that since the texts do no exist, they have not been discussed and have no status.

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LOS/PCN/SCN.4/1993/CRP.48
2 April 1993
ENGLISH
ORIGINAL: RUSSIAN

PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 4
Eleventh session
Kingston, Jamaica
22 March-2 April 1993

SUGGESTED AMENDMENT TO THE DRAFT PROVISIONAL REPORT OF SPECIAL COMMISSION 4 (LOS/PCN/SCN.4/WP.15)

Submitted by the delegation of the Russian Federation

In order to ensure that the views and positions expressed during the discussions in Special Commission 4 are reflected in a more balanced manner, and taking into account the consultations being held with a view to ensuring the universality of the United Nations Convention on the Law of the Sea, it is proposed that the following additional paragraph should be included in the Introduction to the report:

> "The Commission notes that nothing in this report, nor any absence of objections to the provisions of the report, should be interpreted as prejudging the positions of States parties, which will be determined by whether agreement is reached on the outstanding issues currently under discussion."
